Supreme Court, U.S.
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In The

Supreme Court of the United States

USX CORPORATION; BESSEMER AND LAKE ERIE RAILROAD COMPANY,

Petitioners,

v.

ADRIATIC INSURANCE COMPANY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655 (2003), this Court held that for purposes of determining removal jurisdiction under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1603, an entity's status as an agency or instrumentality of a foreign government must be determined based on facts existing at the time the lawsuit is filed. This Court also held that indirect, tiered ownership was insufficient to confer instrumentality status under the majority ownership prong of § 1603(b)(2).

In light of these two holdings in *Dole Food*, the opinion below presents two independent questions for this Court's review:

> (1) Whether the Third Circuit's opinion below conflicts with and contravenes this Court's holding in *Dole Food* by finding that instrumentality status for purposes of the "organ" prong of § 1603(b)(2) can be determined based on facts existing years before the filing of the lawsuit, as opposed to those existing at the time of filing; and
>
> (2) Whether the Third Circuit's opinion below conflicts with and contravenes this Court's holding in *Dole Food* by finding that indirect, tiered ownership is sufficient to confer instrumentality status under the "organ" prong of § 1603(b)(2).

Petitioners and Appellants respectfully request that this Court grant review on these questions.

PARTIES TO THE PROCEEDINGS

Petitioners

U.S. Steel Corporation and Bessemer and Lake Erie Railroad Co.

Respondents

Adriatic Insurance Company; AG Group, The Successor In Interest to Securitas A.G.; AIU Insurance Company; Allianz Underwriters Insurance Company; Allianz Versicherungs A.G.; Allstate Insurance Company, The Successor in Interest to Northbrook Excess & Surplus Insurance Company and Northbrook Insurance Company; American Insurance Company; American Reinsurance Company; AON Corporation, The Successor in Interest to Union Indemnity Insurance Company of New York; Arkwright Mutual Insurance Company; Atlanta International Insurance Company; Birmingham Fire Insurance Company; Centennial Insurance Company; Continental Casualty Company; Continental Insurance Company; Danielson National Insurance, The Successor in Interest to the Mission Insurance Company; Employers Mutual Casualty Company; European General Reinsurance Company of Zurich; Evanston Insurance Company; Excess Insurance Company, LTD.; Federal Insurance Company; Fireman's Fund Insurance Company; First State Insurance Company; Government Employees Insurance Company; Granite State Insurance Company; Haftpflichtverband Der Deutschen Industrie Versicherungsverein A.G.; Hartford Accident and Indemnity Company; Insurance Company of the State of Pennsylvania; International

PARTIES TO THE PROCEEDINGS – Continued

Insurance Company; Lexington Insurance Company; National Casualty Company; National Union Fire Insurance Company of Pittsburgh, PA; Northbrook Excess & Surplus Insurance Company; Northbrook Insurance Company; Rotterdamse Assurantiekas N.V.; St. Paul Surplus Line Insurance Company; Sentry Insurance, A Mutual Company, As Assumptive Reinsurer of the Great Southwest Fire Insurance Company; Swiss Reinsurance Company; Tudor Insurance Company; Twin City Fire Insurance Company; United States Fire Insurance Company; Vanliner Insurance Company, The Successor in Interest to The Great Southwest Fire Insurance Company; Westchester Fire Insurance Company; Zurich Insurance Company; Zurich International LTD; Certain of the Underwriters and International Insurers Subscribing to Lloyd's Policy Nos. 77DD2126C, 78BH3189, 78BH3190, 78BH3191, PY021577, PY021378/78DD1459C, 79BH1269, 79BH1270, 78DD1406C, 79BH1271, 79BH1272, 80DD19C/PY021379, 79BH5311, 79BH5312, PY135179, PY021379A, 80BH0659, 80BH0660, 80BH0661, 80BH0662, PY172180/80DD2562C, PY172280/80DD2563C, HA081280/LBM/1HB06910, 2KA42270/HA081281/LBR, KY019382, KY019482, KY021982, AND KY021881; Icarom, Formerly known as Insurance Corporation of Ireland; and Icarom plc, formerly known as Insurance Corporation of Ireland

DISCLOSURE STATEMENT

Petitioner and Appellant United States Steel Corporation is a successor by merger of USX Corporation. There is no public company that holds more than 10 percent of United States Steel Corporation's stock.

Petitioner and Appellant Bessemer and Lake Erie Railroad is a second-tier subsidiary of Great Lakes Transportation, LLC, a privately held Delaware limited liability company. There is no public company that owns more than 10 percent of Bessemer's stock.

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PETITION

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit, entered September 25, 2003.

I.

OPINIONS BELOW

This petition is from the United States Court of Appeals for the Third Circuit's opinion in *USX Corp. v. Adriatic Ins. Co., et al.*, No. 00-3424, 345 F.3d 190, 2003 WL 22211498 (3rd Cir. 2003), which affirmed an unpublished opinion of the United States District Court for the Western District of Pennsylvania dated September 11, 2002.

A copy of the court of appeals' September 25, 2003 opinion is included in the Appendix at App. 1. A copy of the district court's March 29, 1996 opinion is included at App. 54. A copy of the district court's March 22, 2000 opinion is included at App. 90. A copy of the district court's September 11, 2002 opinion is at App. 178.

II.

JURISDICTION

The district court originally exercised federal jurisdiction pursuant to 28 U.S.C. § 1441(d) and 28 U.S.C. § 1603 on the basis that ICAROM plc ("ICI/Icarom"), the sole third party defendant in this case, qualified as an "instrumentality of a foreign state" under the FSIA. USX challenged that exercise of federal jurisdiction in the district court and on appeal before the United States

Court of Appeals for the Third Circuit. The court of appeals entered an order on May 1, 2001, remanding the action to the district court for discovery on the jurisdictional issue. The May 1, 2001 order also provided for USX to file a renewed motion to remand at the conclusion of the permitted discovery.

Once discovery was completed, USX renewed its original motion to remand the action to state court. The district court denied USX's renewed motion on September 11, 2002. USX appealed to the Third Circuit. The court of appeals affirmed the district court's decision upholding federal jurisdiction on September 25, 2003. USX timely filed this Petition for Writ of Certiorari within 90 days of the judgment of the court of appeals. This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

III.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441(d):

Section 1441. Actions removable generally

. . .

(d) Any civil action brought in a state court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without a jury. Where removal is based upon this subsection, the time limitations of section 1446(b)

of this chapter may be enlarged at any time for cause shown.

28 U.S.C. § 1603(b):

Section 1603. Definitions

For purposes of this chapter –

(a) A "foreign state" except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

IV.

STATEMENT OF THE CASE

Like *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655 (2003), this case presents a recurring and important question regarding the appropriate construction of the

Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603 (2003).[1] Enacted by Congress in 1976, the FSIA is intended to bring the United States in line with international practice by providing foreign states and their agencies and instrumentalities with a means of easing the risks associated with litigation in the United States. To strike an appropriate balance between fostering comity with foreign nations and protecting the interests of litigants, the FSIA imposes various restrictions on plaintiffs. Among these are the denial of a right to a jury trial, the imposition of special service of process rules, and a limitation on the execution of judgments.

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[1] Much of today's business, commercial and tort litigation involves foreign parties. The FSIA accordingly is invoked with frequency in resolving these disputes. *See, e.g., Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (2nd Cir. 2003); *Southway v. Cent. Bank of Nig.*, 328 F.3d 1267 (10th Cir. 2003); *EIE Guam Corp. v. Long Term Credit Bank of Japan*, 322 F.3d 635 (9th Cir. 2003); *Altmann v. Republic of Aus.*, 317 F.3d 954 (9th Cir. 2002); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2nd Cir. 2002); *World Wide Demil, LLC v. Nammo*, 2002 U.S. App. LEXIS 23959 (4th Cir. 2002); *Monegasque de Reassurances S.A.M. (monde Re) v. Nak Naftagaz of Ukr*, 311 F.3d 488 (2nd Cir. 2002); *Presidential Comm'n on Good Gov't v. United States Dist. Court for the Dist. Of Haw. (In re Republic of Phil.)*, 309 F.3d 1143 (9th Cir. 2002); *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240 (5th Cir. 2002); *World Wide Minerals, LTD. v. Republic of Kaz*, 296 F.3d 1154 (D.C. Cir. 2002); *Rodriguez v. Republic of Costa Rica*, 297 F.3d 1 (1st Cir. 2002); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002); *Int'l Ins. Co. v. Caja Nacional De Ahorro Y Seguro*, 293 F.3d 392 (7th Cir. 2002); *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677 (8th Cir. 2002); *Keller v. Cent. Bank of Nig.*, 227 F.3d 811 (6th Cir. 2002); *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 2003 U.S. Dist. LEXIS 19018 (N.D. Tex. 2003); *Simons v. Lycee Francais De New York*, 2003 U.S. Dist. LEXIS 17644 (S.D.N.Y. 2003); *A, B, C, D, E, F v. Zemin*, 282 F. Supp 2d 875 (N.D. Ill. 2003).

The FSIA, in conjunction with 28 U.S.C. § 1441(d), provides that an action brought in state court against an "agency or instrumentality" of a foreign state may be removed to federal court, where the defendant will be accorded the protections noted above. To qualify for such protections, the putative agency or instrumentality must demonstrate either that a majority of its shares are owned by a foreign state, or that it is an "organ" of a foreign state.

In *Dole Food*, this Court held, for purposes of removal jurisdiction, that an entity's status as an "agency or instrumentality" of a foreign government must be determined based on the facts that exist at the time the lawsuit is filed. The Court also held that indirect, tiered ownership is insufficient to confer instrumentality status under the majority ownership prong of § 1603(b)(2). In this case, the Third Circuit has contravened both of these holdings. First, it did not determine instrumentality status based on the facts as they existed at the time the lawsuit was filed; rather, it relied on facts as they existed more than *ten years preceding the lawsuit*. Second, it found, based primarily on these same dated facts, that while indirect, tiered ownership was insufficient to confer instrumentality status under the majority ownership prong of § 1603(b)(3), such ownership *could be* relied on to confer "organ" status.

A. The Initial Proceedings Regarding Removal Under The FSIA

In 1995, USX brought an action in Pennsylvania state court, based entirely on state-law claims, seeking insurance coverage under hundreds of excess umbrella liability insurance policies issued by dozens of domestic and

international insurers, including insurers active in the London Insurance Market. The London Market Insurers included the Insurance Corporation of Ireland (hereinafter referred to as "ICI/Icarom"). ICI/Icarom was incorporated in 1935 as a private, commercial insurance company. In 1985, the company was placed in "administration," the Irish equivalent of bankruptcy. Since that time, ICI/Icarom has operated strictly as a runoff company, winding down its remaining liabilities. ICI/Icarom does not engage in any public activities on behalf of the Republic of Ireland or, indeed, in any public activity at all. ICI/Icarom has a handful of employees, none of whom are civil servants, who manage the organization's finances and pay out existing liabilities.

Despite its rather insignificant participation in USX's insurance coverage portfolio,[2] ICI/Icarom removed the Pennsylvania action to federal court pursuant to 28 U.S.C. § 1441(d), claiming agency or instrumentality status as a foreign sovereign under the majority ownership prong of § 1603(b)(2) of the FSIA. Thereafter, USX voluntarily dismissed its lawsuit. USX then refiled its complaint in state court in Pennsylvania, this time expressly excluding any alleged "agency or instrumentality of a foreign state," including ICI/Icarom, from the suit.

Three of the defendants in the subsequent suit, however, filed third-party complaints against ICI/Icarom,

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[2] Of the hundreds of insurance policies implicated by USX's lawsuit, which aggregate in excess of $1.6 *billion* of insurance coverage, ICI/Icarom had a fractional participation in only six of them, with a total exposure of between $1.3 and $1.6 million, or 0.1% of the total coverage at issue.

asserting contribution claims for any liability resulting from USX's insurance coverage action. ICI/Icarom again removed the action to federal court, relying exclusively on the Republic of Ireland's indirect ownership of a majority of ICI/Icarom's stock as the predicate for its alleged status as an "agency or instrumentality" of a foreign state.

USX promptly moved to remand the action to state court. By order dated March 29, 1996, the district court denied USX's remand motion, as well as USX's related motion to engage in jurisdictional discovery. The district court held that ICI/Icarom was an agency or instrumentality of a foreign state based solely on the Republic of Ireland's indirect, tiered ownership of ICI/Icarom's stock. (App. 79).

The parties then proceeded to litigate the substantive insurance coverage issues, and on March 22, 2000, the district court issued an Opinion and Order granting summary judgment in favor of the defendant insurers. (App. 90). USX timely appealed both the March 19, 1996 and March 22, 2000 orders to the United States Court of Appeals for the Third Circuit.[3] The court of appeals entered an Order on May 1, 2001, remanding the action so that USX could conduct jurisdictional discovery. The Third Circuit retained jurisdiction over the merits of the action, but specifically provided for USX to file a renewed motion to remand after the completion of discovery.

Once the jurisdictional discovery had been completed, USX renewed its motion to remand. On September 11,

[3] The March 22, 2000 order is not at issue in this petition and therefore not included in the Appendix that accompanies it.

2002, the district court denied that motion, again holding that the Republic of Ireland's indirect, tiered ownership of stock was sufficient to confer foreign state status on ICI/Icarom under the FSIA. (App. 210). This time, however, the district court alternatively held that ICI/Icarom was an "organ" of the Republic of Ireland under the FSIA – a jurisdictional basis that ICI/Icarom had *never* raised until responding to the renewed motion to remand, seven years *after* USX's original motion to remand was filed. (App. 210). USX appealed the district court's decision.

B. The Proceedings Leading To The Third Circuit's Expansive Interpretation Of The FSIA

While this case was pending before the Third Circuit, this Court rendered its decision in *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655 (2003). There, this Court held that: (1) indirect, tiered ownership is insufficient to confer agency or instrumentality status under the majority ownership prong of the FSIA; and (2) for purposes of removal jurisdiction, agency or instrumentality status must be determined based on the record facts as they exist at the time the lawsuit is filed. *Id.* at 1663.

Consistent with this Court's reasoning, the Third Circuit rejected ICI/Icarom's claim that the Republic of Ireland's indirect, majority ownership of ICI/Icarom was sufficient to confer instrumentality status. This did not resolve the matter, however, as the Third Circuit then affirmed the district court's alternate holding that ICI/Icarom, in any event, was an "organ" under the FSIA. (App. 47).

Since this latter issue presented a question of first impression for the Third Circuit, the court of appeals

looked to how the term "organ" was construed in other circuits. In that regard, the Ninth Circuit had the most developed jurisprudence on this issue, and the Third Circuit accordingly looked to the Ninth Circuit's approach in crafting its own. (App. 32). The Third Circuit noted that in determining organ status, the Ninth Circuit focuses on "whether the entity 'engages in a public activity on behalf of the foreign government.'" (App. 32). To answer this over-arching question, the Ninth Circuit considers: (1) the circumstances of the entity's creation; (2) the purpose of its activities; (3) the level of financial support from the government; (4) the entity's employment policies with respect to whether it is staffed by government employees; and (5) its obligations and privileges under state law. (App. 32).

In making its determination on organ status, however, the Third Circuit departed significantly from the Ninth Circuit's approach. Specifically, the Third Circuit focused on the ownership structure of the entity, a factor that has no counterpart in the Ninth Circuit's approach. The Third Circuit then gave this novel factor paramount importance, placing much emphasis on the Republic of Ireland's governmental interest in indirectly acquiring ICI/Icarom's shares in 1985 – fifty years after ICI/Icarom was incorporated as a private company and ten years before this suit was filed. (App. 37, 38). After interjecting these irrelevant and stale ownership facts into its analysis, the Third Circuit found that five of the seven factors weighed in favor of ICI/Icarom's organ status and accordingly upheld the FSIA's application as a basis for removal. (App. 47).

V.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari for two principal reasons.

First, the opinion below conflicts with and contravenes this Court's decision in *Dole Food,* 123 S. Ct. 1655, by determining jurisdiction under the FSIA based on facts existing more than ten years prior to the filing of the lawsuit. In *Dole Food*, this Court, relying on the express language of the FSIA, held that the facts to be considered in the jurisdictional calculus are those that exist at the time the lawsuit is filed.

Second, the opinion below conflicts with and contravenes this Court's holding in *Dole Food* that indirect, tiered ownership is insufficient to confer instrumentality status under the majority ownership prong of the FSIA. It does so by according this indirect ownership factor significant weight in determining instrumentality status under the "organ" prong of the same subsection. The Third Circuit's analysis creates this conflict by allowing indirect, tiered ownership to serve as a proxy to confer instrumentality status under the organ prong of § 1603(b), where such status would be rejected under the majority ownership prong.

Despite the primacy of *Dole Food*, the Third Circuit has struck out on its own and recast the prevailing "organ" analysis in a way that materially expands the scope of what now will be considered an agency or instrumentality of a foreign state under the FSIA. This expansion, in turn, goes well beyond Congress's stated goal of promoting comity with foreign nations. This Court's intervention thus

is needed to settle: (1) the conflicts engendered by the Third Circuit's approach; and (2) the controlling standards for determining removal under the FSIA.

This Court is, of course, the ultimate arbiter on the construction of federal statutes, and as it did in *Dole Food*, it can re-establish the balance Congress intended in enacting the FSIA. Further, the issues raised here concerning the appropriate construction of the FSIA are squarely presented on this record. Subject matter jurisdiction rests solely on the basis of § 1603(b), and through the putative organ status of a single, third-party defendant.

A. The Third Circuit's Opinion Conflicts With And Contravenes This Court's Holding In *Dole Food* That Jurisdiction Under The FSIA Depends On The Facts Existing At The Time The Lawsuit Is Filed

An entity may remove an action to federal court through 28 U.S.C. § 1441(d) if that entity qualifies as a "foreign state" under the FSIA. Section (a) of the FSIA defines a foreign state as including any "agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603 (2003). Subsection (b) in turn defines an "agency or instrumentality of a foreign state" as an entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and

> (d) of this title nor created under the laws of any third country.

(*Id.*)

In *Dole Food*, the appellant companies (the Dead Sea Companies) argued that the FSIA should operate like other status-based immunities and that, for removal jurisdiction purposes, instrumentality status should be determined based on the facts existing at the time of the conduct giving rise to the suit. *Dole Food*, 123 S. Ct. at 1662. This was a critical issue because any relationship between the Dead Sea Companies and the State of Israel had been severed before the suit was brought. *Id.* at 1663.

Noting that the language of § 1603(b)(2) is expressed in the present tense, this Court disagreed and instead concluded that instrumentality status should be determined "at the time suit is filed." *Id.* at 1662. The Court then compared this jurisdictional provision with federal-diversity jurisdiction, which "depends on the citizenship of the parties at the time the suit is filed." *Id.* "Construing § 1603(b) so that the present tense has real significance is consistent with the 'longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Id.* (quoting *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993)).

Thus, this Court held that the Dead Sea Companies could not be considered an agency or instrumentality of Israel, even if they could have demonstrated such status at some time prior to the lawsuit. The issue was not whether the Dead Sea Companies ever could have claimed agency or instrumentality status, but whether they had that status at the time federal jurisdiction under the FSIA was invoked.

To be sure, the *Dole Food* case implicated the majority ownership prong of § 1603(b)(2), but this Court's holding on the time as of which jurisdictional status should be determined – considering the record facts as they existed at the time the lawsuit was filed – was not so limited. Rather, its holding plainly extended – based on the language of the statute and general jurisdictional principles – to any attempt to invoke the jurisdiction of the federal courts under § 1603(b)(2). The Third Circuit's opinion below, however, rejected this aspect of *Dole Food*, apparently because the "organ" prong of § 1603(b)(2), as opposed to the majority ownership prong, was implicated. For purposes of determining *when* jurisdictional status must be determined, however, that is a distinction without a difference.

Here, the court of appeals held that ICI/Icarom was an agency or instrumentality of the Irish government based predominately on the government's important interest in indirectly acquiring ICI/Icarom *in 1985*, and *not* on ICI/Icarom's activities at the time the suit was filed. By 1990, ICI/Icarom's business operations, including its entire book of Irish business, had been sold off to a French company, and any important government interest the Irish government had protected by acquiring ICI/Icarom in 1985 had evaporated. At the time of the lawsuit, all that remained of the corporate entity in the Republic of Ireland was a shell of a bankrupt company that was neither operated nor controlled by the Irish government; rather, it simply was running off liabilities on policies issued before the government acquired its interest. Therefore, as in *Dole Food*, the corporate entity here effectively had severed its relationship with the foreign state prior to the lawsuit.

Any test that focuses primarily on the foreign state's rationale for indirectly acquiring an entity's shares ten years prior to the invocation of federal jurisdiction necessarily conflicts with the rule that the critical inquiry with respect to the relevant jurisdictional facts (whether through organ status or majority ownership) must be made at the time the lawsuit is filed. The Third Circuit's disregard of the time of filing standard results in ICI/Icarom being held an agency or instrumentality of a foreign government – defined by well established jurisprudence to mean that it performs public activities on behalf of a foreign state – even though at the time of the filing of the lawsuit in 1995 ICI/Icarom *conducted no public activities whatsoever*. This point is underscored by the record in this action; the Republic of Ireland was fully apprised of this case yet never took the position, in over seven years of litigation, that ICI/Icarom ever engaged in any public activity on its behalf.

This timing divergence is particularly acute here because the clear language of § 1603(b) mandates an approach at odds with the Third Circuit's. As this Court stated in *Dole Food*: "The statutory language will not support a control test that mandates inquiry in every case into the past details of a foreign nation's relation to a corporate entity in which it does not own a majority of the shares." *Dole Food*, 123 S. Ct. at 1662. Yet, that "past details" inquiry is precisely what the Third Circuit's analysis endorses.

Further, this timing divergence is even more profound because it can be outcome determinative, as was the case with the Dead Sea Companies and is the case with ICI/Icarom here. In this case, the Third Circuit conspicuously relied on factors stemming from the ownership

structure of the entity and the Republic of Ireland's important governmental interest in bailing out the entity's corporate parent in 1985, ten years prior to the filing of the lawsuit. Of further note is that the 1985 bailout occurred fifty years after the entity was initially created as a private, commercial insurance company, and it is during this period that USX purchased the policies at issue in this case. There would be no colorable argument for ICI/Icarom to claim status as an instrumentality of the Irish government from 1935 to 1984. By 1990, ICI/Icarom had sold off its assets and remaining business. By 1995, when the lawsuit was filed, ICI/Icarom was winding down, no longer engaged in the business of insuring Irish citizens, and not conducting activities on behalf of the Irish government.

If the decision below remains uncorrected, entities seeking the protections of the FSIA as "organs" of foreign governments will point to the facts and circumstances that pre-date the filing of the litigation – an approach expressly rejected in *Dole Food*. Yet, there is no reconciling a time-of-filing standard for determining instrumentality status for purposes of the majority ownership prong of § 1603(b)(2) with an "any time in an entity's history" standard for making the determination for purposes of the organ prong. This disparity is inexplicable, unnecessary, and should be rectified through this Court's prompt intervention.

B. The Third Circuit's Opinion Conflicts With And Contravenes This Court's Holding In *Dole Food* That Indirect, Tiered Ownership Is Insufficient To Confer Instrumentality Status Under The Majority Ownership Prong Of The FSIA

When this Court rendered its decision in *Dole Food*, it made explicit that a foreign state's indirect, tiered ownership of an entity's stock is insufficient to establish instrumentality status under § 1603(b)(2)'s ownership prong. *Dole Food*, 123 S. Ct. at 1660. The Court held that "a foreign state must itself own a majority of the shares of a corporation if the corporation is to be deemed an instrumentality of the state under the provisions of the FSIA." *Id.*

As the factual background here reveals, this Court's holding in *Dole Food* on the majority ownership prong of § 1603(b)(2) figured prominently in this litigation. For nearly seven years, the majority ownership prong provided the impetus for removal under the FSIA. But here, as the Third Circuit recognized, the holding in *Dole Food* precluded removal on that basis. With respect to ICI/Icarom's jurisdictional status, there was at best indirect, tiered ownership by the foreign state. That did not meet the *Dole Food* standard.

Undeterred, the Third Circuit took the same indirect ownership facts and relied on them in conferring "organ" status under that prong of § 1603(b)(2). The organ prong thereby became a proxy sufficient to convert ICI/Icarom into an instrumentality of a foreign state based on indirect ownership, where such ownership had been insufficient to do so under the statute's majority ownership prong. The Third Circuit's transparent reliance on facts showing indirect, tiered ownership is in direct contravention of this

Court's reasoning in *Dole Food*. The Third Circuit recognized as much in its opinion, noting that it had opened the door for entities to attempt to avoid *Dole Food* by resorting to the organ prong. As the Third Circuit put it:

> A flexible approach is particularly appropriate after *Dole*, inasmuch as courts likely now will be asked to evaluate the possible organ status of a wide variety of entities controlled by foreign states through tiering arrangements and because of the widely differing forms of ownership and control foreign states may exert over entities.

(App. 35).

Yet, this Court expressly had refused to endorse such an analysis when looking at instrumentality status under the majority ownership prong. In *Dole Food*, this Court observed that the Dead Sea Companies "appear to think that, in determining instrumentality status under the Act, control may be substituted for an ownership interest. Control and ownership, however, are distinct concepts." *Dole Food*, 123 S. Ct. at 1662. The Court thus was unwilling to credit indirect ownership when determining agency and instrumentality status under the FSIA because it did not focus on the relevant issue – a foreign state's present control of the public activities of the putative agency or instrumentality.

Although the Court's statement about indirect ownership and control was made in the context of its analysis of the majority ownership prong, this Court's rejection of ownership as a factor relevant to determining instrumentality status is consistent with the language and purpose of § 1603(b)(2) and the FSIA as a whole. As summarized by the Ninth Circuit, the primary focus under the organ

analysis of the FSIA is "whether the entity engages in a public activity on behalf of a foreign government." *Patrickson v. Dole Food Co., Inc.*, 251 F.3d 795, 807 (9th Cir. 2001). In keeping with this focus, courts opining on organ status have focused on whether the entity performs a public activity on behalf of the government – *not on* the government's activities or reasons for indirectly acquiring the entity's shares. *See, e.g.*, *EIE Guam Corp. v. The Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635 (9th Cir. 2003) (finding of organ status because the entity expressly performs the "public function" of administering non-performing loans and conducting other activities private companies are not permitted to perform under Japanese law); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 848 (5th Cir. 2000) (finding of organ status because the entity functions for the "national purpose" of developing the government's mineral resources); *Southern Ocean Seafood Co. v. Holt Cargo Sys, Inc.*, 1997 WL 539763 (E.D. Pa. Aug. 11, 1997) (finding of organ status because the entity functions for the "national purpose" of regulating national fishing resources and ensuring compliance with foreign treaties).

Instead of principally considering whether ICI/Icarom performs public activities on behalf of the Republic of Ireland as a baseline inquiry, the Third Circuit relied predominately on the rationale for the Republic of Ireland's decision to acquire ICI/Icarom's stock years before this lawsuit was filed. The result is that the Third Circuit test defines *organ* status so expansively as to include the very organizations that this Court held in *Dole Food* could not be labeled instrumentalities under the proper construction of majority ownership prong in § 1603(b)(2).

Applying the Third Circuit analysis to the Dead Sea Companies in *Dole Food* illustrates the inconsistency in the two approaches. The Dead Sea Companies initially were organized by the Knesset, Israel's national legislature, to develop and market the Dead Sea's resources "in a manner consistent with Israel's national interests." 2001 U.S. Briefs 594 (2002). The Companies were charged with regulating the "efficient exploitation of the minerals of the Dead Sea, which – as natural resources of the State of Israel – should serve *'the interests of the economy of the State.'" Id.* (emphasis added). The Dead Sea Companies, furthermore, were subject to "substantial control and oversight" of the "highest ranking officials and bodies of the Israeli government." *Id.* The Dead Sea Companies additionally argued before this Court that the State of Israel "owned" these companies in the "colloquial sense of that term." *Dole Food*, 123 S. Ct. at 1660. These factors notwithstanding, this Court held that the Dead Sea Companies were not agencies or instrumentalities of the State of Israel because of the tiered nature of the ownership structure at the time of filing.

The same inconsistency is demonstrated by the record facts here. As the Third Circuit recognized, ICI/Icarom was incorporated in 1935 as a private, commercial insurance company. ICI/Icarom conducted its private, commercial business of selling insurance policies until its 1985 placement in administration, the Irish equivalent of bankruptcy. Since then, ICI/Icarom has operated strictly as a run-off company, employing a handful of non-government employees to wind up its remaining liabilities. ICI/Icarom, therefore, clearly has conducted no ongoing public activity on behalf of the Republic of Ireland. Rather, the Republic of Ireland's relationship with ICI/Icarom is limited solely

to its indirect acquisition of ICI/Icarom's stock in 1985 as part of a government bailout of AIB, one of Ireland's largest banks and the former owner of ICI/Icarom.

Thus, the same sort of ownership facts that would not support instrumentality status for the Dead Sea Companies in *Dole Food* are given conclusive weight in the Third Circuit's organ analysis. Accordingly, should the Dead Sea Companies find themselves defending a lawsuit in a state court within the Third Circuit, they now would be able to remove to federal court under § 1603(b) of the FSIA. Under the Third Circuit's analysis, it is difficult to conceive of an entity whose shares are indirectly owned by a foreign state that would *not* be entitled to organ status. That is particularly true where, as here, the Third Circuit has extended the indirect ownership inquiry to any time in the entity's history.

Finally, although the Third Circuit purported to follow the factorial approach established by the Ninth Circuit for considering "organ" status under the FSIA, the two Circuits are in conflict as well. As noted above, the Third Circuit added "indirect ownership" to the Ninth Circuit's list of analytical factors and, relying on facts relevant to this new factor, conferred organ status on ICA/Icarom. It is the significance given to the facts related to indirect ownership, not the Ninth Circuit's factorial approach itself, that brings the Third Circuit's holding into conflict with *Dole Food*. But consideration of those indirect ownership facts also contravenes the Ninth Circuit's approach. Indeed, the Ninth Circuit does not specifically identify indirect ownership – or ownership of any kind – as a relevant factor, much less an outcome determinative one, for determining organ (and thus instrumentality) status under the FSIA.

In the wake of an increasingly troubled and integrated global economy, this result will increase the number of cases in federal courts presenting solely state law issues.[4] Under the Third Circuit's expansive analysis, any entity indirectly acquired by a foreign government similarly would be empowered to invoke federal jurisdiction in any case in which it is just a tangential party. The federal courts uniformly have interpreted the FSIA to allow even a single third-party defendant to remove an entire action asserting solely state law claims to federal court. *See, e.g., In re Air Crash Disaster Near Roselawn*, 96 F.3d 932 (7th Cir. 1996); *In re Surinam Airways Holding Co.*, 974 F.2d 1255 (11th Cir. 1992); *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990). That is precisely what happened in this case, where ICI/Icarom was not sued by USX, but was impleaded by a named defendant seeking contribution on the order of approximately 0.1% of the interest at stake in the litigation.

This result extends the scope of the FSIA well beyond the intent of Congress. Congress enacted the FSIA in 1976 in order to "codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law." H.R. Rep No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6605. There is "a wide acceptance of the so-called restrictive theory of sovereign immunity; that is, that the sovereign immunity of foreign states should be

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[4] Not only will the Third Circuit's analysis expose the federal courts to significantly more claims of organ status, but it also will increase the work load for federal district courts by opening the door to additional discovery on indirect ownership before a threshold determination on federal jurisdiction may be rendered.

'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform." *Id.* at 14.

The House Reports fortify the baseline inquiry for organ status that for an entity to be considered an organ of a foreign state, it must presently conduct public activities on behalf of that foreign state. Absent this fundamental inquiry, the statute simply does not follow the restrictive principle of sovereign immunity. The Third Circuit's test, however, extends the FSIA's reach to corporations indirectly owned by foreign states without regard to whether they perform sovereign acts. "Foreign sovereign immunity . . . is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns." *Dole Food*, 123 S. Ct. at 1663.

The inevitable consequence is that the same organization may be considered an organ of a foreign state in the Third Circuit, but not elsewhere. Thus, whether an entity can remove to federal court will depend on the fortuity of where the action is initiated. This lack of uniformity is particularly troubling with a jurisdictional statute like the FSIA and should be immediately corrected by this Court. The level of confusion engendered by the Third Circuit's opinion, therefore, requires immediate guidance from this Court in the form of a ruling clarifying the extent federal courts may exercise jurisdiction under the organ provision of the FSIA. This is the only way to ensure needed consistency among the Circuits, and to settle any lingering

remaining jurisdictional issues posed by the FSIA in the wake of this Court's decision in *Dole Food*.

VI.

CONCLUSION

The Third Circuit's opinion below conflicts with this Court's holding in *Dole Food* in two important respects that confound the appropriate jurisdictional inquiries under the FSIA. Petitioners respectfully urge this Court to grant certiorari in order to resolve these conflicts and provide clarity on a recurring issue of federal jurisdiction with worldwide implications.

DATED: December 24, 2003.

Respectfully submitted,

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345 F.3d 190

USX CORPORATION; BESSEMER AND LAKE ERIE RAILROAD COMPANY v. ADRIATIC INSURANCE COMPANY; AG GROUP, The Successor in Interest to SECURITAS A.G.; AIU INSURANCE COMPANY; ALLIANZ UNDERWRITERS INSURANCE COMPANY; ALLIANZ VERSICHERUNGS A.G.; ALLSTATE INSURANCE COMPANY, The Successor in Interest to NORTHBROOK EXCESS & SURPLUS INSURANCE COMPANY and NORTHBROOK INSURANCE COMPANY; AMERICAN INSURANCE COMPANY; AMERICAN REINSURANCE COMPANY; AON CORPORATION, The Successor in Interest to UNION INDEMNITY INSURANCE COMPANY OF NEW YORK; ARKWRIGHT MUTUAL INSURANCE COMPANY; ATLANTA INTERNATIONAL INSURANCE COMPANY; BIRMINGHAM FIRE INSURANCE COMPANY; CENTENNIAL INSURANCE COMPANY; CONTINENTAL CASUALTY COMPANY; CONTINENTAL INSURANCE COMPANY; DANIELSON NATIONAL INSURANCE, The Successor in Interest to the MISSION INSURANCE COMPANY; EMPLOYERS MUTUAL CASUALTY COMPANY; EUROPEAN GENERAL REINSURANCE COMPANY OF ZURICH; EVANSTON INSURANCE COMPANY; EXCESS INSURANCE COMPANY, LTD.; FEDERAL INSURANCE COMPANY; FIREMAN'S FUND INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY; GRANITE STATE INSURANCE COMPANY; HAFTPFLICHTVERBAND DER DEUTSCHEN INDUSTRIE VERSICHERUNGSVEREIN A.G.; HARTFORD ACCIDENT AND INDEMNITY COMPANY; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; INTERNATIONAL INSURANCE

COMPANY; LEXINGTON INSURANCE COMPANY; NATIONAL CASUALTY COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; NORTHBROOK EXCESS & SURPLUS INSURANCE COMPANY; NORTHBROOK INSURANCE COMPANY; ROTTERDAMSE ASSURANTIEKAS N.V.; ST. PAUL SURPLUS LINE INSURANCE COMPANY; SENTRY INSURANCE, A MUTUAL COMPANY, As Assumptive Reinsurer of the GREAT SOUTHWEST FIRE INSURANCE COMPANY; SWISS REINSURANCE COMPANY; TUDOR INSURANCE COMPANY; TWIN CITY FIRE INSURANCE COMPANY; UNITED STATES FIRE INSURANCE COMPANY; VANLINER INSURANCE COMPANY, The Successor in Interest to The GREAT SOUTHWEST FIRE INSURANCE COMPANY; WESTCHESTER FIRE INSURANCE COMPANY; ZURICH INSURANCE COMPANY; ZURICH INTERNATIONAL LTD.; CERTAIN OF THE UNDERWRITERS AND INTERNATIONAL INSURERS SUBSCRIBING TO LLOYD'S POLICY NOS. 77DD2126C, 78BH3189, 78BH3190, 78BH3191, PY021577, PY021378/78DD1459C, 79BH1269, 79BH1270, 78DD1406C, 79BH1271, 79BH1272, 80DD19C/PY021379, 79BH5311, 79BH5312, PY135179, PY021379A, 80BH0659, 80BH0660, 80BH0661, 80BH0662, PY172180/80DD2562C, PY172280/80DD2563C, HA081280/LBM/1HB06910, 2KA42270/HA081281/LBN, KY019382, KY019482, KY021982, AND KY021882; ICAROM, Formerly known as INSURANCE CORPORATION OF IRELAND; ICAROM plc, formerly known as INSURANCE CORPORATION OF IRELAND; USX Corporation and Bessemer and Lake Erie Railroad Company, Appellants.

No. 00-3424

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

August 1, 2003, Reargued
September 25, 2003, Filed

SUBSEQUENT HISTORY:

As Corrected October 6, 2003.

PRIOR HISTORY: On Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. Civ. No. 95-00866). Honorable Gustave Diamond, District Judge. *USX Corp. v. Adriatic Ins. Co.*, 99 F. Supp. 2d 593, 2000 U.S. Dist. LEXIS 4115 (W.D. Pa., 2000).

DISPOSITION: Affirmed.

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JUDGES:

BEFORE: ROTH, STAPLETON, and GREENBERG, Circuit Judges.

OPINION BY:

OPINION:

OPINION OF COURT

GREENBERG, *Circuit Judge*.

GREENBERG

I. INTRODUCTION

This matter comes on before this court on appeal from a summary judgment entered for the defendants and from orders denying motions to remand this insurance policy coverage case to the state court in which it had been initiated. This litigation, though not reaching trial, has been protracted and has followed complex underlying proceedings in other consolidated cases. Though, as will be seen, we summarily will resolve the substantive issue before us which we find not to be difficult, we nevertheless set forth the background of the case in some detail.

Appellants USX Corporation and Bessemer and Lake Erie Railroad Company ("B&LE"), its subsidiary at the times material to this action (together herein usually called "USX"), have sought indemnification from the approximately 50 appellees ("insurers") under umbrella liability insurance policies the insurers issued to USX.[1] These policies were developed for a program which USX initiated in the 1970s when, in consultation with its domestic insurance broker, Marsh & McLennan, it determined to obtain insurance for catastrophic liabilities. Ultimately USX obtained liability insurance in furtherance of this program covering seven periods from May 12, 1977, to April 1, 1983. From May 12, 1977, through December 1, 1979, the programs included between four and six layers of insurance providing $128.1 million to $151 million of coverage for liability imposed in excess of a $50 million self-insured retention. From December 1, 1979, to April 1, 1983, the programs involved between six and seven layers of insurance providing between $275 million and $325 million of coverage in excess of a $25 million self-insured retention. The multi-layered umbrella policies included broad comprehensive coverage based on London umbrella insurance policies and provided:

> Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability:

---

[1] USX's most recent corporate disclosure statement under Fed. R.App. P. 26.1 indicates that B&LE is now a wholly owned subsidiary of Great Lakes Transportation, LLC, a Delaware limited liability company.

> (a) imposed upon the Assured by law . . . for damages on account of:
>
> (i) Personal Injuries
>
> (ii) Property Damage
>
> (iii) Advertising Liability,
>
> caused by or arising out of each occurrence happening anywhere in the world.

Joint App. at 133.[2] The term "Personal Injuries" was defined as:

> bodily injury . . . mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination, humiliation; also libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any advertising activities.

Joint App. at 135. The policies, however, excluded coverage for liability arising out of discrimination based on race, creed, color or national origin. "Advertising liability" included:

> 1) Libel, slander or defamation;
>
> 2) Any infringement of copyright or of title or of slogan;

---

[2] USX explains that the various policies issued were "in all respects material to this dispute . . . identical to the 1971 London umbrella form." Br. at 10-11. In this opinion we refer to the original appendix filed in this court as "Joint App." and the appendix filed after the remand on the jurisdictional issue that we describe below as "Juris. JA."

> 3) Piracy or unfair competition or idea misappropriation under an implied contract;
>
> 4) Any invasion of right of privacy;
>
> committed or alleged to have been committed in any advertisement, publicity article, broadcast or telecast and arising out of the Named Assured's advertising activities.

Joint App. at 135-36. The term "occurrence" was defined as:

> an accident, or a happening, or an event, or a continuous or repeated exposure to conditions, which unexpectedly and unintentionally results in a personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

Joint App. at 136.

In 1982, B&LE pleaded *nolo contendere* to an indictment in the United States District Court for the District of Columbia for a violation of the Sherman Antitrust Act, 15 U.S.C. § 1, for participating in a conspiracy in restraint of trade. The district court convicted and sentenced B&LE and on appeal the court of appeals affirmed. *United States v. Bessemer & Lake Erie R.R. Co.*, 230 U.S. App. D.C. 316, 717 F.2d 593 (D.C.Cir. 1983). The criminal case was followed by massive civil litigation in which numerous entities involved in the lower Lake Erie iron ore transportation market (including five steel companies, three dock companies and three trucking companies) filed ten separate civil suits in various United States district courts

against several railroads (including B&LE) which operated docks to receive iron ore and from which to transport the ore to inland steel mill locations. The complaints alleged that the railroads had agreed to restrain trade by denying or preventing the introduction of self-unloading vessels and by preventing non-railroad-owned docks and trucking firms from participating in the transportation of iron ore from the upper Great Lakes and Eastern Canada to discharge ports on the lower Great Lakes and the Detroit River.

The ten civil cases were consolidated and transferred to the United States District Court for the Eastern District of Pennsylvania in April 1984 and became known as MDL 587, the *In re Lower Lake Erie Iron Ore Antitrust Litigation*. The court tried MDL 587 in two phases, a liability phase followed by a damage phase. The jury in the liability phase rendered verdicts determining that B&LE had participated with the other railroads in a conspiracy to restrain trade in nine of the ten cases in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, and Ohio law. In eight of the cases, the jury awarded substantial damages for losses the MDL plaintiffs suffered, and thereafter the court entered final judgments reflecting trebled damages under the federal antitrust laws and double damages under Ohio law. According to USX, the district court entered final judgments totaling $638.5 million against B&LE which ultimately satisfied them by paying over $592 million. The cases against the defendants other than B&LE were settled or dismissed before or during the trial leaving it as the sole defendant. B&LE appealed to this court but on May 27, 1993, we affirmed the district court's judgment against it. *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3d Cir. 1993).

B&LE filed a petition for certiorari but the Supreme Court denied it and thus the underlying litigation is over.

In particular certain of the facts related to the conspiracy are as follows. The railroads owned docks which used "huletts" or heavy cranes to unload ore from standard freighters ("bulkers") to railroad cars to be transported to inland steel mills. As technology advanced self-unloaders were developed that eliminated the need for huletts and made the railroads' unloading equipment obsolete. Furthermore, use of self-unloaders would have permitted unloading of ore at private docks the railroads did not own and would have made it possible for ore to be shipped inland in trucks rather than on railroad cars.

In the appeal in the civil antitrust suit we explained that the railroads accomplished the restraint of trade and delayed the introduction of self-unloaders:

> by charging the same rate for unloading a self-unloader as for unloading a bulker, by refusing to approve commodity line haul rates from private docks which would have handled self-unloaders, and by concertedly refusing to make dock property available for use by private docks. . . .

In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d at 1168. The railroads charged tariffs that assessed the same dock handling service charges for self-unloading vessels as for conventional vessels, even though they provided much greater services for the conventional vessels. Moreover, the railroads charged certain shippers and competitors transportation rates from railroad-owned docks to steel mills that were much lower than the transportation rates available from private docks to the steel mills. Certain

railroads also refused to sell or lease property for use as private iron ore docks.

The policies did not include the usual provisions providing for the insurers to defend the insured for claims within the policies, and in fact, the insurers did not defend B&LE in the *In re Lower Lake Erie Litigation*. USX, however, did seek indemnity from the insurers after the judgment against B&LE was entered. The insurers refused this demand and consequently on March 31, 1995, USX filed a coverage action in the Court of Common Pleas of Allegheny County, Pennsylvania, naming most of the insurers who had participated in its catastrophic liability insurance program from May 12, 1977, to April 1, 1983, as defendants. ICAROM plc ("ICAROM"), one of the named defendants and the successor to the Insurance Corporation of Ireland ("ICI"), removed that action to the United States District Court for the Western District of Pennsylvania on the grounds that it was an "agency or instrumentality of a foreign state" within the meaning of 28 U.S.C. § 1603 ("section 1603"), a provision of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ("FSIA"), and thus could remove the action pursuant to 28 U.S.C. § 1441(d) ("section 1441(d)") which provides that a foreign state may remove a state court action to the district court. Section 1441(d) compliments 28 U.S.C. § 1330(a) which gives district courts jurisdiction over actions against foreign states as defined in section 1603(a). An "agency or instrumentality of a foreign state" is itself a foreign state within sections 1441(d) and 1603.

On May 18, 1995, USX voluntarily dismissed its first Common Pleas Court action without prejudice and initiated the current action in the same court by filing a complaint identical to its original complaint except that it

excluded as defendants any entity that was an "agency or instrumentality of a foreign state" within the meaning of section 1603 and did not include ICAROM. Br. of Appellants at 6; Joint App. at 372. Three of the named insurers then filed separate third-party complaints joining ICAROM as a third-party defendant, asserting claims for contribution against it.

ICAROM reacted by again filing a notice of removal pursuant to section 1441(d), claiming that it was an agency or instrumentality of a foreign state within the meaning of section 1603. USX countered by filing a motion to remand the action to the state court on the ground that ICAROM was not an agency or instrumentality of a foreign state. By an order dated July 18, 1995, the district court stayed all proceedings, including discovery, pending disposition of the jurisdictional issue that USX raised by its motion to remand. The district court subsequently denied the motion to remand as well as USX's related motion to engage in jurisdictional discovery by a comprehensive opinion and order dated March 29, 1996, and entered April 1, 1996, as it found that ICAROM was an agency or instrumentality of a foreign state.

The court then lifted the stay and the parties engaged in substantive discovery following which all parties filed motions for summary judgment. On March 22, 2000, the court issued a comprehensive opinion and order granting the insurers' motions for summary judgment and denying USX's motion for partial summary judgment. *USX Corp. v. Adriatic Ins. Co.*, 99 F. Supp. 2d 593 (W.D. Pa. 2000).

USX timely appealed from the orders of April 1, 1996, and March 22, 2000, and, following briefing and oral argument, we entered an order on May 1, 2001, without an

accompanying opinion, reversing the order of April 1, 1996, but only to the extent that it denied USX's motion for leave to engage in discovery with respect to subject matter jurisdiction. We did not, however, disturb the order for summary judgment. In the same order we remanded the case to the district court to allow discovery on the jurisdictional issue and, even though we retained jurisdiction, we authorized USX to move in the district court at the completion of jurisdictional discovery for an order vacating the final judgment in the case and remanding the case to the state court. Our order further provided for the parties to file supplemental briefs in this court after completion of the remand proceedings.[3] In fact, the parties engaged in jurisdictional discovery on the remand following which USX again moved to remand the case to the state court. On September 11, 2002, the district court issued another comprehensive opinion and order denying the motion to remand.[4] In that opinion the district court deemed the notice of removal amended to correct any asserted deficiency in it.

After the district court rendered its September 11, 2002 opinion and order but before the parties filed their supplemental briefs and before we rescheduled oral

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[3] If the district court had vacated the final judgment and remanded the case to the state court presumably the appeal would have become moot and we would have dismissed it. We are not concerned here with whether 28 U.S.C. § 1447(d) then would have precluded the insurers from appealing.

[4] The district court had issued yet another comprehensive opinion in this case regarding a matter not in issue on this appeal on September 30, 1998. *See USX Corp. v. Adriatic Ins. Co.*, 64 F. Supp. 2d 469 (W.D. Pa. 1998).

argument, the parties filed a joint motion asking us to hold the case in abeyance until the Supreme Court decided the appeal in *Dole Food Co. v. Patrickson,* 155 L. Ed. 2d 643, 123 S.Ct. 1655 (2003), as they anticipated, correctly as it turned out, that *Dole* would resolve an aspect of the jurisdictional question we were to consider on the appeal. We granted that motion and then, after the Court decided *Dole,* the parties filed their supplemental briefs and we scheduled and entertained oral argument and now decide the case in this opinion. Even though USX did not file an amended notice of appeal to encompass the September 11, 2002 order, in view of the unusual circumstance that we remanded the case to the district court but retained jurisdiction, we will treat the appeal as including that order though it is not specifically listed in the notice of appeal.

II. DISCUSSION

There are two overarching issues on this appeal. First, USX contends that the district court did not have subject matter jurisdiction because the only asserted basis for exercise of such jurisdiction is that ICAROM, a third-party defendant, is a foreign state within the meaning of the FSIA as "an agency or instrumentality" of the Republic of Ireland whereas it is no such thing. Thus, in USX's view the district court should have granted its motion to remand and never have addressed this case on the merits. It further contends that the insurers are barred by waiver for reasons that we will explain below from raising an aspect of their argument supporting the district court's exercise of jurisdiction. Second, USX contends that if the district court had jurisdiction it erred in granting the

insurers summary judgment on the merits. We, of course, consider the jurisdictional issue first.

A. *THE JURISDICTIONAL QUESTION*

The district court's ruling that ICAROM is an agency or instrumentality of a foreign state for purposes of subject-matter jurisdiction under the FSIA presents a question of law subject to plenary review, and we exercise plenary review over the denial of the motion to remand. *Werwinski v. Ford Motor Co.,* 286 F.3d 661, 665 (3d Cir. 2002); *Fed. Ins. Co. v. Richard I. Rubin & Co.,* 12 F.3d 1270, 1282 (3d Cir. 1993). While we would review the district court's factual findings for clear error if they were disputed, *In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig.,* 15 F.3d 1230, 1238 n.8 (3d Cir. 1994), there are no disputes of historical fact here, and thus we reject the insurers' contention that we should review the district court's finding that ICAROM was an agency or instrumentality of a foreign state deferentially for clear error. Indeed, USX indicates that it "does not dispute the District Court's factual findings relating to ICI/ICAROM's alleged organ status." Reply Br. at 9. We review the district court's decision to deem the notice of removal amended to correct any asserted deficiency in it on an abuse of discretion basis. *See Scattergood v. Perelman,* 945 F.2d 618, 627 (3d Cir. 1991). The district court exercised jurisdiction pursuant to section 1441(d) which permits foreign states as defined in the FSIA to remove actions brought against them to the district court and we have jurisdiction under 28 U.S.C. § 1291.

Section 1603, which is as we have indicated a provision of the FSIA, provides:

> For purposes of this chapter
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity
>
> > (1) which is a separate legal person, corporate or otherwise, and
> >
> > (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> >
> > (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.
>
> (c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

Significantly section 1603(b)(2) is two-pronged as it specifies that an entity may be an "agency or instrumentality" by reason of being owned by a foreign state or being its organ.

Originally the district court denied the motion to remand on the basis of its finding that the Republic of Ireland owned "a majority" of ICAROM's shares, a conclusion it reached because the court determined that the "tiered" ownership through which Ireland owned ICAROM, *i.e.*, the ownership of an entity that in turn owned ICAROM, was sufficient to establish Ireland's

ownership of ICAROM itself for purposes of the FSIA. Following the remand the district court adhered to that conclusion and, in addition, held that ICAROM was an agency or instrumentality of Ireland as its "organ," a finding that it had not made in its April 1, 1996 opinion. Thus, as it originally had done, it determined that it had jurisdiction and denied the motion to remand.

In *Dole,* however, after the district court denied USX's renewed motion to remand, the Supreme Court rejected the "tiered" ownership theory under the FSIA as it held that a subsidiary of an instrumentality is not itself an instrumentality. The parties agree that *Dole* is controlling here to the extent that the district court upheld its exercise of jurisdiction predicated on the majority ownership prong of section 1603(b)(2), and thus we cannot affirm its order denying remand on the basis of that conclusion. The insurers contend, however, that the district court did have jurisdiction inasmuch as ICAROM is, as the district court held, an organ of the Irish government and by reason thereof is its agency or instrumentality. USX answers that the insurers cannot rely on the organ prong of section 1603(b)(2) for determining if ICAROM is an agency or instrumentality of Ireland as they have waived their right to do so, and, in any event, ICAROM is not an organ of the Irish government.

In view of the jurisdictional discovery and the submissions of the parties we know a great deal about ICAROM which, as we have indicated, formerly was known as the

Insurance Corporation of Ireland.[5] ICI was incorporated as a limited liability company in Dublin in 1935 and rapidly grew to become the largest liability and marine insurer in Ireland. In the 1970s it expanded its operations into foreign markets, including the London Insurance Market. In 1981, Allied Irish Banks ("AIB") acquired 25% of ICI, and in 1983 purchased the remainder of ICI and assumed its full control. By 1984, however, AIB determined that ICI's continued viability was in question, due in part to losses associated with its London business.

In early 1985, AIB informed the Irish government of ICI's precarious position. At the time, AIB was one of the largest banks in Ireland, and ICI was a leading insurer to corporate Ireland. On March 15, 1985, the Irish government, hoping to avoid ICI's collapse and to minimize the general economic repercussions that such a collapse could trigger, took emergency action. AIB transferred all shares of ICI for the nominal sum of IR £ 5 to Gebhard Limited ("Gebhard"), a shelf company that an Irish law firm assisting the Irish government had formed to acquire the ICI shares. Gebhard then assumed a guarantee AIB previously had given to the Institute of London Underwriters on behalf of ICI. The agreement to assume the guarantee was subject to approval by the Irish Minister for Industry, Trade, Commerce, and Tourism ("the Minister"). Two high-ranking civil servants held Gebhard's only two shares[6] in trust for the Minister. That same day, ICI

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[5] The district court in its comprehensive opinion of September 11, 2002, set forth the facts related to ICAROM in great detail.

[6] Under Irish law, a company such as Gebhard that is not a public limited company ("plc") must have at least two shareholders.

was placed into administration pursuant to the Insurance Act of 1983 ("the 1983 Act") authorizing appointment of an administrator to take over the management of insolvent insurers for the purpose of placing them on sound commercial and financial footing, a process similar to comparable American proceedings. The statute authorizes the administrator to access the Insurance Compensation Fund ("ICF"), a mechanism used to channel funds to finance insurers' operations. The Minister nominated William McCann, a partner in the accounting firm of Gregg, Gardner & Company, as ICI's provisional administrator, and Ireland's High Court made his appointment permanent on March 25, 1985.

On March 20, 1985, Gebhard changed its name to Sealuchais Arachais Teoranta ("SAT"). SAT had no employees and was simply a holding company, which, as the Minister described in an address to Parliament, had no "influence over the management of the company in administration . . . because the company in administration is managed by the administrator who has set aside the board of the company in administration and is acting in accordance with the law and the directions of the court." Juris. J.A. at 297.

On April 8, 1985, the Irish Parliament passed the Insurance (Miscellaneous Provisions) Act of 1985 ("the 1985 Act"), retroactively authorizing the acquisition of SAT (formerly Gebhard) effective as of March 15, 1985. The 1985 Act further provides that the Minister may hold the shares of SAT as he or she sees fit and that SAT's shareholders must hold the shares in trust for the Minister and pay all dividends or other monies received to the Minister for the benefit of the Exchequer. Moreover, the 1985 Act provides that the Minister may require the

shareholders to transfer their shares back to the Minister or his designee and that upon the death of a shareholder, the shares automatically vest in the Minister without the need for any transfer of shares. The 1985 Act authorizes the Minister to appoint the directors of SAT after consultation with the Minister of Finance and provides that the directors hold office on terms and conditions the Minister determines subject to being removed by him or her at any time. Finally, the 1985 Act authorizes the Minister to guarantee payment by ICI under certain insurance policies issued by the Institute of London Underwriters and requires the Minister to report to Parliament concerning payments made under such guarantee.

Because Irish law requires a public limited company ("plc") to have at least seven shareholders, the government arranged for legal title to six of ICI's 120 million common shares to be vested in civil servants who hold the shares in trust for the Minister. SAT retained the remaining 119,999,994 shares. Notwithstanding the 1985 Act's provisions allowing the Minister to acquire and hold its shares as the Minister sees fit, the Minister never has acquired direct legal title to the shares of SAT.

In 1990, the administrator negotiated the sale of ICI's ongoing insurance operations in Ireland ("the Irish Business"), as well as ICI's trade name and goodwill. The administrator sought and obtained permission from the government to test the market for such a sale and subsequently initiated a competitive process to generate tender offers from outside companies. When the field was reduced to two competitors, the administrator made a formal recommendation to the government which the cabinet approved. ICI thereafter sold its trade name and the Irish Business to Orkandale Holdings, Ltd. ("Orkandale"), a

subsidiary of Assurances Generales de France ("AGF"). All of ICI's shares were transferred to Orkandale for a short time during which Orkandale exercised a put option that caused all of the assets, other than the Irish Business and ICI's trade name, as well as the ICI shares to revert to SAT. These procedures allowed AGF to take advantage of ICI's tax losses in the range of £ 150 million. After it shed the Irish Business and the ICI trade name, ICI was renamed ICAROM. ICAROM has not underwritten new business but rather has operated as a "runoff company," the entire purpose of which is to wind up its remaining liabilities, the complete discharge of which is not expected to be accomplished until 2040 or 2050.

According to USX, ICAROM is nothing more than a private company in administration under the 1983 Act authorizing such action for insolvent insurers. It points out that the administrator, not the government, manages and controls ICAROM's day-to-day operations, ICAROM does not have board or shareholder meetings, and no actions, appointments, or other corporate business can be conducted by shareholder vote. The administrator's management of ICAROM is subject only to approval by the High Court. As USX emphasizes, the only other insurer to have operated under administration pursuant to the 1983 Act is an Irish insurance company known as PMPA/Primor ("PMPA"), in which the government never has claimed any ownership interest. The ICF has provided the outside funding of ICAROM and the government has not funded ICAROM directly. The government has not incurred costs as a result of the operation and administration of ICAROM other than having foregone interest on a £ 32 million loan that the Irish Exchequer agreed to provide

interest-free as part of a 1992 Financing Agreement for ICAROM's benefit.[7]

Notwithstanding the circumstances to which USX alludes, the record demonstrates that the government has played a role in financing ICAROM and in overseeing the administrator's management of the company. The administrator regularly consults with the Department of Enterprise, Trade, and Employment on all significant matters and all major decisions are made with the department's approval. The administrator delivers a formal presentation annually to the Departments of Enterprise, Trade, and Employment and Finance regarding the status of ICAROM's operations and prepares quarterly reports that are forwarded to the same departments. The departments supported the nomination of the current administrator before the High Court and approved the current general manager prior to his appointment by the administrator.

Although the government has not provided funding directly to ICAROM, it has channeled funds into the ICF so that they can be disbursed to ICAROM. Under a 1985 Financing Agreement, £ 100 million was advanced to the ICF for the benefit of ICAROM. AIB provided £ 70 million, while the government, through the Irish Central Bank, provided a £ 30 million loan.[8] Under the 1985 Agreement, interest on the £ 30 million loan in the amount of £ 3.5 million per annum was to be paid by AIB and other private

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[7] We believe that the government also has had costs in terms of the use of time of its officials on ICAROM matters though our result does not depend on these costs having been incurred.

[8] ICAROM repaid in full the £ 100 million in September of 2000.

banks. In fact, interest rates fell and the interest due was less than the £ 3.5 million per annum set by the agreement. Although the government was entitled to retain the extra funds (approximately £ 2.1 million), it disbursed the excess interest payments to ICAROM. In 1992, there was another Financing Agreement executed whereby AIB made an aggregate payment of £ 176 million, at a rate of £ 8.8 million per year for 20 years, to the ICF, while the government, through the Exchequer, contributed the one-time interest-free loan of £ 32 million discussed above. The foregone interest amounted to approximately £ 2.1 million per year. ICAROM is expected to repay these advances in 2012.

Finally, ICAROM received, through the ICF, the proceeds of four commercial loans from three separate financial institutions in the amount of £ 65 million. The Irish Department of Finance guaranteed that the ICF would have sufficient funds to satisfy the obligations on these four loans, as authorized by Irish statute, although it did not directly guarantee them. Those loans have been fully repaid, and the government has not been obligated to make good on its guarantees.

1. *Waiver*

The first aspect of the jurisdictional dispute that we address is whether the insurers waived the right to rely on the "organ" basis of jurisdiction.[9]

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[9] We recognize that it could be argued that the insurers other than ICAROM do not have standing to advance the jurisdictional argument inasmuch as only ICAROM could have removed the case. We will not

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ICAROM's notice of removal states:

> Removal of this action is expressly authorized by 28 U.S.C. § 1441(d), which provides, in pertinent part: "Any civil action brought in a State against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending."
>
> ICAROM is a "foreign state" within the meaning of 28 U.S.C. § 1603(a). That section defines a "foreign state" as, *inter alia*, "an agency or instrumentality of a foreign state as defined in subsection (b)." Subsection (b) of § 1603, in turn defines "an agency or instrumentality of a foreign state" as "any entity" that (1) "is a separate legal person, corporate or otherwise," (2) "is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," and (3) "is neither a citizen of a State of the United States . . . nor created under the laws of any third country." *Id.* § 1603(b).
>
> ICAROM meets all of these criteria. It is a corporation organized pursuant to the laws of the Republic of Ireland. A majority of ICAROM's shares or other ownership interest is owned by the government of the Republic of Ireland. ICAROM is neither a citizen of the United States nor created under the laws of any third country.

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linger on this point, however, inasmuch as ICAROM itself is defending the district court's denial of the motions to remand.

> ICAROM is therefore a "foreign state" within the meaning of 28 U.S.C. § 1603(a).

Joint App. at 492 (alteration in original). USX does not contend that ICAROM does not satisfy the first and third requirements of section 1603(b) for an entity to be an "agency or instrumentality of a foreign state."

Prior to our remand of the case ICAROM argued that it satisfied the second element of section 1603(b) because Ireland owned a majority of its shares and the district court agreed with that contention. On the remand, as we have indicated, the district court adhered to its earlier conclusion that Ireland owned ICAROM through a "tiered" arrangement within the FSIA's definition of majority ownership by a foreign state. Juris. J.A. at 37. Since that time, however, as we also have indicated, the Supreme Court has held that a subsidiary of an instrumentality is not itself entitled to instrumentality status, so that "tiering" arrangements cannot provide the basis for finding foreign state status under the majority ownership prong of section 1603(b)(2). Rather, that prong applies "only if the foreign state itself owns a majority of the corporation's shares." *Dole,* 123 S.Ct. at 1662.

The district court, however, also considered ICAROM's alternative argument on the remand under the "organ" prong of section 1603(b)(2), which ICAROM explicitly first advanced at that time, and held that ICAROM qualified as an organ of Ireland and thus was its agency or instrumentality. In answer to USX's argument that ICAROM waived the right to invoke the "organ" prong by referencing only the majority ownership prong in the notice of removal, the district court deemed the notice amended under 28 U.S.C. § 1653, which provides that "[d]efective allegations of

jurisdiction may be amended, upon terms, in the trial or appellate courts," noting that the notice of removal "invoked § 1603 in its entirety" and that ICAROM's "organ" argument "is premised on the same facts that support its invocation of the instrumentality prong." Juris. J.A. at 37-40. ICAROM does not dispute that it initially relied on the majority ownership prong of section 1603(b)(2), but it argues that its notice of appeal nevertheless referenced section 1603 as a whole. It further contends that, in any event, even if it belatedly advanced the organ prong argument it caused USX no prejudice by doing so and its procedure was reasonable inasmuch as before *Dole* it appeared that a tiering arrangement would satisfy the majority ownership prong of section 1603(b)(2) and, indeed, we so had held with respect to ICAROM itself in *In re Texas E. Transmission Corp.*, 15 F.3d at 1238 n.8. It also contends that the same set of facts underlie an analysis under both the ownership and organ prongs of section 1603(b)(2).

Section 1653 gives both district and appellate courts the power to remedy inadequate jurisdictional allegations, but not defective jurisdictional facts. *Newman-Green, Inc. v. Alfonzo Larrain,* 490 U.S. 826, 831-32, 109 S. Ct. 2218, 2222, 104 L. Ed. 2d 893 (1989).[10] Moreover, we have held that a district court abused its discretion by *not* allowing plaintiffs to amend their complaint to allege jurisdiction on diversity grounds where diversity existed but had not

[10] It is clear that USX, initially not contesting ICAROM's foreign state status under section 1603(b), tried to avoid creating a basis for federal jurisdiction by dismissing its initial state court action and then bringing a second state court action omitting ICAROM.

been a necessary basis for jurisdiction before the federal claims in the case were dismissed. *Scattergood,* 945 F.2d at 627.

In this case, ICAROM stated all three elements of the "agency or instrumentality" definition in its notice of removal, including as part of the second element as defined in section 1603(b)(2) both the majority ownership prong and the organ prong. It then alleged that "ICAROM meets all of these criteria." Joint App. at 492. To be sure, in its brief recitation of the facts supporting that allegation, ICAROM noted that Ireland owned a majority of its shares, thus directly referencing only the majority ownership prong of section 1603(b)(2). Although jurisdiction under that prong cannot be sustained after *Dole,* any possible defect in the notice of removal is of the sort that we ordered the district court to cure with respect to a complaint pursuant to section 1653 in *Scattergood* which seems to us to be persuasive authority in this parallel situation. Here, reliance on the organ prong as a basis for jurisdiction was not clearly required until the Supreme Court clarified that tiering arrangements would not satisfy the majority ownership prong of section 1603(b)(2). Moreover, although, under *Dole,* Ireland does not own ICAROM for purposes of the FSIA, its mistaken allegation to that effect bears on a point central to the organ inquiry, namely, Ireland's control over ICAROM.

Thus, the same allegations contained in the notice of removal, amended only to clarify that Ireland controls, rather than owns, ICAROM through SAT, support the crucial allegation of the notice, namely, that ICAROM satisfies all the requirements to be an agency or instrumentality of Ireland as set forth in section 1603(b). In other words, although the allegation of ownership most

clearly relates to the majority ownership prong of section 1603(b)(2), it is also highly relevant to ICAROM's organ status. The district court's amendment of the notice pursuant to section 1653 therefore did not add new jurisdictional facts and did not rely on a basis of jurisdiction different from that originally alleged,[11] namely that ICAROM is an agency or instrumentality of Ireland under section 1603. All it did was amend the ownership allegation in light of an intervening clarification in the law.[12]

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[11] USX cites a number of cases disallowing amendments creating an entirely new basis for jurisdiction. *See, e.g., Blakeley v. United Cable Sys.*, 105 F. Supp. 2d 574, 579-80 (S.D. Miss. 2000); *Iwag v. Geisel Compania Maritima, S.A.*, 882 F. Supp. 597, 601 (S.D. Tex. 1995); *see also* 14C Charles Alan Wright, et al. *Federal Practice and Procedure* § 3733, at 358-61 (3d ed. 1998) ("[A]mendment of the removal notice may correct an imperfect statement of citizenship, or state the previously articulated grounds more fully, or correct the jurisdictional amount. Completely new grounds for removal jurisdiction may not be added and missing allegations may not be furnished, however.") (footnote omitted). These cases are inapposite, however, as new grounds for removal have not been added and new factual allegations have not been made.

[12] ICAROM submitted the affidavit of Brendan Murphy, its former general manager, in opposition to USX's original motion to remand setting forth the history and purpose of the government's involvement with ICAROM and other facts that pertain not only to the majority ownership analysis but to the organ analysis. The Supreme Court has upheld removal where jurisdictional facts required to support the removal were found in later-filed affidavits rather than in the notice of removal. *Willingham v. Morgan*, 395 U.S. 402, 407 n.3, 89 S. Ct. 1813, 1816 n.3, 23 L. Ed. 2d 396 (1969) ("This material should have appeared in the petition for removal. However, for purposes of this review it is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits. *See* 28 U.S.C. § 1653."). Other courts more recently have allowed consideration of facts contained in later-filed affidavits, treating those facts as an amendment of the notice of removal under section 1653. *See, e.g., Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 n.1 (9th Cir. 2002)

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ICAROM alleges now, as it did originally, that jurisdiction exists under section 1441(d) because it is an agency or instrumentality of the Republic of Ireland under section

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(holding that the district court did not err in construing an affidavit setting forth the facts supporting the amount in controversy in a diversity case as an amendment under section 1653 to the notice of removal which stated summarily, without alleging any underlying facts, that the amount in controversy exceeded $75,000); *cf. Miller v. Principal Life Ins. Co.*, 189 F. Supp. 2d 254, 257-58 (E.D. Pa. 2002) (holding that, even assuming that the defendant's initial removal petition was defective in that it did not state that a codefendant was only a nominal defendant, *Willingham* permitted treatment of an amended notice of removal filed more than 30 days after the filing of the original removal notice and after service of a motion to remand as an amendment of the original notice under section 1653). Furthermore, this approach is consistent with 28 U.S.C. § 1446(a), which, borrowing language from the liberal pleading standard of Fed. R. Civ. P. 8(a), was amended in 1988 to require only a "short and plain statement of the grounds for removal." *See* Charles Alan Wright et al., 14C *Federal Practice and Procedure* § 3733, at 351-56 (3d ed. 1998) (describing the amendment of section 1446(a) and stating: "[T]he better rule is that detailed grounds for removal need not be set forth in the notice. Rather, it should be sufficient if the court is provided the facts from which removal jurisdiction can be determined. Thus, the same liberal rules employed in testing the sufficiency of a pleading should apply to appraising the sufficiency of a defendant's notice of removal," (footnotes omitted)). Accordingly, although we are mindful that courts construe removal statutes strictly with all doubts resolved in favor of remand, *see Boger Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990), we are satisfied that sections 1446(a) and 1653, together with the Supreme Court's opinion in *Willingham*, permit a court to consider jurisdictional facts contained in later-filed affidavits as amendments to the removal petition where, as here, those facts merely clarify (or correct technical deficiencies in) the allegations already contained in the original notice. To the extent, if any, that cases like *Fuller v. Exxon Corp.*, 131 F. Supp. 2d 1323, 1327 (S.D. Ala. 2001), take a more restrictive view of section 1653, we decline to adopt their reasoning.

1603.[13] Thus, the district court's determination to allow the amendment amplifying the notice of removal clearly was within its sound discretion.[14]

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[13] We also point out that section 1653 need be invoked to permit an amendment only after the expiration of the 30-day period within which an action may be removed under 28 U.S.C. § 1446(b), during which time a removal notice may be amended freely. *See Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 368 (7th Cir. 1993). Under 28 U.S.C. § 1441(d), however, "where removal is based upon this subsection [governing removal by a foreign state], the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown." Because the 30-day time limit on free amendments of the petition is derived from section 1446(b), section 1441(d) would appear to allow a foreign state to amend its removal petition freely during the 30-day time period and for cause at any other time. Furthermore, it appears that an amendment for cause under section 1441(d) likely could be on broader grounds than might be permissible under 28 U.S.C. § 1653 although we do not rely on that possibility here. *See* footnote 11 *supra*. We are satisfied that USX suffered no prejudice as a result of the district court's consideration of the organ prong because ICAROM raised this argument shortly after remand from this court so that USX had ample time to respond to it, and because in part the same facts are relevant under either the ownership or organ prong of section 1603(b)(2) although they could not satisfy the ownership prong here. In this regard we observe that when we asked at oral argument what prejudice that USX suffered by reason of ICAROM's possibly late identification of the organ prong of section 1603 as a basis for foreign state status and thus for district court jurisdiction, USX's attorney was not able to make a specific indication of what it might be. Certainly USX had ample time to develop the facts with respect to ICAROM's organ status.

[14] Certain insurers contend that USX has waived the waiver issue by not discussing the fact that the district court deemed the notice amended under section 1653 and not arguing that it abused its discretion in doing so. Supp. Br. at 30 & n.8. Inasmuch as USX's brief does discuss section 1653, albeit briefly, USX Br. at 29, it did not waive this issue.

2. *Analysis Under the Organ Prong*

The FSIA does not define the term "organ" as used in section 1603(b)(2) and we have not had occasion to consider the meaning or application of that term under the statute. Other courts have developed a flexible approach to determine whether an entity qualifies as an organ of a foreign state under the FSIA and thus is its agency or instrumentality. The Court of Appeals for the Ninth Circuit asks whether the entity "'engages in a public activity on behalf of the foreign government.'" *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) (quoting *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), *aff'd in part, dismissed in part,* 155 L. Ed. 2d 643, 123 S. Ct. 1655 (2003)). In doing so, that court considers factors including "'the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law.'" *Id.* (quoting *Patrickson,* 251 F.3d at 807). The court also has stated that "the Act's legislative history suggests that Congress intended the terms 'organ' and 'agency or instrumentality' to be read broadly." *Gates v. Victor Fine Foods,* 54 F.3d 1457, 1460 (9th Cir. 1995). The Court of Appeals for the Fifth Circuit looks to similar factors: "'(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.'" *Kelly v. Syria Shell Petroleum Dev. B.V.,* 213 F.3d 841, 846-47 (5th Cir. 2000) (quoting *Supra Med. Corp. v. McGonigle,* 955 F.

Supp. 374, 379 (E.D. Pa. 1997)). That court, however, does not apply those factors mechanically and does not require that all five support a determination that an entity is an organ. *Id.* These two courts of appeals appear to be the only ones to have considered directly the factors leading to a conclusion that an entity is an organ of a foreign state.

A primary purpose of the FSIA is to make it difficult for private litigants to bring foreign governments into court, thereby avoiding affronting them. *Patrickson,* 251 F.3d at 806 (citing *First Nat'l City Bank v. Banco Nacional de Cuba,* 406 U.S. 759, 762, 92 S. Ct. 1808, 1810-11, 32 L. Ed. 2d 466 (1972)). In passing the FSIA, Congress adopted the so-called restrictive theory of sovereign immunity, whereby a foreign state (including its agencies and instrumentalities) is immune from suit for its public or sovereign activities, but not for its commercial or private activities. H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605. Even when a case involves a foreign state's private activities, however, the FSIA provides the state with particularized procedural treatment in some circumstances, for example, regarding venue, 28 U.S.C. § 1391(f), rule of decision, *id.* § 1606, and execution, *id.* § 1610. Furthermore, as is evident from this case, a foreign state defendant, when named as a third-party defendant may remove the entire case to a district court, even where it is merely one among almost 50 otherwise non-foreign state defendants. The court then must try the case without a jury. 28 U.S.C. § 1441(d).

The FSIA therefore provides for suit in federal court in a potentially broad array of cases, with significant procedural consequences, some of which a plaintiff likely will not welcome. With respect to the jurisdictional provisions of the FSIA, the legislative history states: "Such

broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, at 13, 1976 U.S.C.C.A.N. at 6611. Thus, in considering the scope of the FSIA the point has not been lost on us that the presence of a foreign state third-party defendant has resulted in the disposition in a district court of a case even though it had been brought in a state court and overwhelmingly involves domestic parties and state law issues and, in the absence of the foreign state party, would have remained in the state court.[15]

In deciding whether to adopt the Court of Appeals for the Ninth Circuit's standard for determining whether an entity constitutes an organ of a foreign state, we therefore should be mindful of the congressional goals of promoting uniformity of decision and avoiding impairing foreign relations because the consequences of the presence of FSIA-predicated jurisdiction are so significant. Surely, a bright-line rule of the sort the Supreme Court adopted with respect to the majority ownership in *Dole* provides for the greatest uniformity of decision. Nevertheless inasmuch as the statute and legislative history are silent as to a definition of the term "organ," and that term inherently is vague and does not have a well-established common law meaning, Congress's inclusion of the term within the definition of "agency or instrumentality" of a foreign state

[15] Of course, the same thing can happen when there is diversity of citizenship even though, as here, the plaintiff initiated the action in a state court.

suggests the need for a more flexible approach under the organ prong of section 1603(b)(2) than the Court adopted in *Dole* with respect to the ownership prong of that section.

A flexible approach is particularly appropriate after *Dole,* inasmuch as courts likely now will be asked to evaluate the possible organ status of a wide variety of entities controlled by foreign states through tiering arrangements and because of the widely differing forms of ownership or control foreign states may exert over entities. *See* Joseph W. Hardy, Jr., Note, *Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act,* 31 Ga. L. Rev. 1121, 1161, 1164-66, 1172-73 (1997). Nonetheless, we must be vigilant to protect the goal of uniformity and therefore in determining whether an entity is an organ should consider factors similar, if not identical, to those considered by the Courts of Appeals of the Ninth and Fifth Circuits.

We agree with the Court of Appeals for the Ninth Circuit that for an entity to be an organ of a foreign state it must engage in a public activity on behalf of the foreign government. Requiring less would open the door to situations in which a party only tangentially related to a foreign state could claim foreign state status and avail itself (and, incidentally, any other defendants in the case) of the FSIA's procedural provisions which, as we have indicated, plaintiffs are not likely to welcome. This result would be unfair to plaintiffs, who in some such cases might not have reason to know of the slight relationship of their dealings with the foreign states, and who, therefore, likely would not have had the opportunity to consider this important fact when negotiating contracts by, for example, negotiating for waiver clauses, or when initiating suit by

following the special procedures required by the FSIA.[16] Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act,* 9 Willamette J. Int'l L. & Disp. Resol. 57, 93 (2001). Requiring less would not further the goal of avoiding adverse foreign relations. On the other hand, requiring more would pose potential foreign relations problems.

One district court, taking a narrow view of the term "organ," cited a Supreme Court case interpreting the term "agency or instrumentality" of the Federal government for purposes of the Federal Tort Claims Act to support its conclusion that organ status under the FSIA turns not on "the degree to which an entity is subject to government regulation aimed at assuring compliance with government goals," but on "the 'power of the Federal Government to control the detailed physical performance of the contractor.'" *See Edlow Int'l Co. v. Nuklearna Elektrarna Krsko,* 441 F. Supp. 827, 832 (D.D.C. 1977) (quoting *United States v. Orleans,* 425 U.S. 807, 814, 96 S. Ct. 1971, 1976, 48 L. Ed. 2d 390 (1976)). The court therefore concluded that the entity involved in that case, a "worker's organization" founded under the constitution and laws of the Socialist Federal Republic of Yugoslavia ("SFRY"), was not an organ of the ultimate control over its policies and operations because its SFRY despite the extent to which the state

[16] Indeed, as this case demonstrates, a party might be dealing with an entity that was not an organ of a foreign state at the time of its dealings. Here USX obtained its insurance coverage for periods before Ireland became involved in ICI and thus it was not dealing with an organ of Ireland at that time. But we are holding that ICAROM was an organ when USX sued it and it removed the case and its status at that time is what matters. *See Dole,* 123 S. Ct. at 1662.

exercised "daily operations [were] virtually free of direct government control." *Id.* This narrow a construction of the term "organ" could have potentially adverse effects on foreign relations insofar as foreign states may place significant national value in an entity yet not directly control its daily operations. The Court of Appeals for the Ninth Circuit's definition finds a happy medium whereby an entity that engages in activity serving a national interest and does so on behalf of its national government qualifies for the protections of the FSIA, including a federal forum.

In making this assessment, factors employed by both the Courts of Appeals for the Ninth and Fifth Circuits are relevant, although no one is determinative: (1) the circumstances surrounding the entity's creation; (2) the purpose of its activities; (3) the degree of supervision by the government; (4) the level of government financial support; (5) the entity's employment policies, particularly regarding whether the foreign state requires the hiring of public employees and pays their salaries; and (6) the entity's obligations and privileges under the foreign state's laws.[17] To this list, we should add an additional factor: (7) the

[17] It is important to note with respect to the sixth factor that characteristics such as the entity's ability to sue and be sued in its own name, to contract in its own name, and to own property in its own name are not particularly significant with respect to a finding of organ status, given that all entities claiming agency or instrumentality status must, under 28 U.S.C. § 1603(b)(1), be a "separate legal person." Congress intended this term to encompass "a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name." H.R. Rep. 94-1487, at 15, 1976 U.S.C.C.A.N. at 6614.

ownership structure of the entity. Under the organ prong, as opposed to the majority ownership prong of section 1603(b)(2), a foreign state might own only 10% of an entity; it might own directly 50% of the entity; or it might own even 100% of a holding company that owns 100% of the entity. On the other hand it is possible that a foreign state might not own any portion of any entity that nevertheless is its organ as section 1603(b)(2) does not require a foreign state to have any ownership interest in an entity for it to be its organ. Courts should consider how these different ownership structures might influence the degree to which an entity is performing a function "on behalf of the foreign government."[18]

Before applying these factors to this case, we reiterate that USX "does not dispute the District Court's factual findings relating to ICI/Icarom's alleged organ status." USX Supp. Reply Br. at 9. USX contends only that the district court misapplied the relevant legal factors in considering those facts.

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[18] Given this analysis, it is clear that the factual allegations of ICAROM's notice of removal, which include the assertion that Ireland owns a majority of ICAROM's shares, are relevant to the organ analysis as well as to the majority ownership analysis on which ICAROM originally focused. Even if we did not add "ownership structure" as a seventh factor to consider in the organ analysis the allegation likely would be relevant to the third factor, namely, the degree of supervision by the government.

a. *The Circumstances Surrounding ICAROM's Creation*

It is undisputed that ICI was created as a purely commercial, private company in 1935 for the for-profit business purpose of selling insurance policies. USX relies heavily on this fact, and on the fact that since being placed in administration ICAROM has continued as a commercial venture by selling off the Irish Business and by running off liabilities. We believe, however, that USX misunderstands the nature of this factor. First, while this factor certainly would weigh more heavily in favor of organ status where the entity originally was created for a government purpose, *see, e.g., Kelly,* 213 F.3d at 848 (noting that the entity in question was created by government decree to develop and explore the government's mineral resources); *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect,* 89 F.3d 650, 654-55 (9th Cir. 1996) (noting that the entity in question was created by Mexican law to refine and distribute property of the Mexican government), it should not be applied so mechanically as to ignore the possibility that a foreign state later may acquire an initially private company and use it for government purposes. Furthermore, that ICAROM's activities may have been predominantly (or entirely) commercial has little bearing on this factor (although it is relevant to the second factor). In any event, a foreign state receives the benefit of the FSIA's procedural provisions in actions arising out of its commercial activities, so that too heavy a focus on the commercial nature of an entity's activities would tend to confuse the question of the level of protection provided by the FSIA (full immunity or not) with the antecedent question we face here, namely, whether the entity comes within the purview of the FSIA at all.

As the district court found, the Irish government indirectly acquired ICI to serve the important national interest of protecting the Irish insurance and banking industries from financial disaster, which in turn helped to maintain stability in the Irish economy. Juris. J.A. at 41-42. The government did not seek any profit-making opportunity, but rather acquired ICI to further this important governmental interest. To advance this purpose, the Minister acted in accordance with special legislation adopted by the Irish Parliament. That legislation further provided that the Minister may hold the shares of SAT as he or she sees fit; SAT's shareholders must hold the shares in trust for the Minister and are bound to pay all dividends or other monies received to the Minister for the benefit of the Exchequer; the Minister may require the shareholders to transfer their shares back to the Minister or to his or her designee; upon the death of a shareholder, the shares automatically vest in the Minister without the need for any transfer of shares; the Minister appoints the directors of SAT after consultation with the Minister of Finance; and the directors hold office on terms and conditions determined by the Minister who may remove them at any time. Moreover, the legislation authorized the Minister to guarantee payment by ICI itself under certain insurance policies.

USX argues that the 1985 Act is irrelevant to ICAROM's status as an organ because the Act authorized the creation and acquisition of SAT, not ICI, and the organ status of SAT is not at issue here. We do not believe, however, that the Supreme Court's holding in *Dole* requires us to blind ourselves to the true nature of the 1985 Act, thus effectively extending *Dole's* antitiering holding to the organ prong of section 1603(b)(2). When the Irish

Parliament passed the 1985 Act, SAT was a holding company with no purpose other than holding all but six shares of ICI. The shares were held in trust for the Minister, who could hold or dispose of them as he or she saw fit. Thus, although the legislation nominally authorized only the acquisition of SAT, in substance the transaction authorized the acquisition of ICI, albeit indirectly.

In USX's view, ICAROM is attempting to circumvent *Dole* by relying on the 1985 Act under the organ prong. *See* USX Reply Br. at 12. The Court's decision in *Dole,* however, turned on a discrete question of statutory interpretation. The Court noted that the majority ownership prong of section 1603(b)(2) "speaks of ownership," and that the prong's insistence on ownership of "shares" demonstrated "that Congress intended statutory coverage to turn on formal corporate ownership." *Dole,* 123 S. Ct. at 1660. Because, under basic tenets of corporate law, a parent corporation does not "own," *i.e.,* have legal title to, the assets of its subsidiary, a parent company does not own shares of a company held by its subsidiary. *Id.* at 1660-61.

As the Court noted, however, "control and ownership . . . are distinct concepts." *Id.* at 1661. The Court rejected a control test under the majority ownership prong because the statutory language of the majority ownership prong of section 1603(b)(2) makes clear that ownership, not control, is required. *Id.* at 1661-62. On the other hand, the organ prong does not speak of ownership. We find that, although Congress favored ownership over control in the majority ownership prong, its use of the word "organ" suggests an emphasis on control under the organ prong. Thus, although the 1985 Act in terms authorized the acquisition of SAT, not ICI, by that time SAT owned ICI and *Dole* does not prohibit us from examining the substance of the

transaction, whereby full control of ICI effectively was transferred to the government, even if legal title to the shares of ICI was not.[19] Because an act of Parliament authorized the government's assumption of control over ICI and because of the extent of the government's involvement and authority in facilitating the transaction, this factor weighs in favor of a finding of organ status.

b. *The Purpose of ICAROM's Activities*

As just discussed, the acquisition of ICI served an important governmental interest, namely protecting the Irish insurance and banking industries from financial disaster and maintaining stability in the Irish economy. To be sure, as USX points out, at least since 1990 ICAROM's purpose has been solely to run off claims arising under old policies, as would a private insolvent insurance company engaged in winding down its business. This observation, however, does not take into account the fact that the government played an integral role in the 1990 transaction that has led ICAROM to operate in this way. In 1990, the administrator consulted with and obtained approval from the government, which played an active role in the bidding process, before disposing of the Irish Business and positioning ICAROM to operate as a runoff company. Furthermore, the administrator still consults with the Minister regarding major decisions and gives regular, detailed reports on the status of ICAROM. Thus, although ICAROM is operating solely as a runoff company, it does

[19] For the same reason, we are able to consider ownership structure as a factor unto itself under the organ prong without running afoul of *Dole* even where that structure involves tiering.

so only because the government positioned it to do so and only under the supervision of the government, as the district court found. *See* Juris. J.A. at 42, 44. Moreover, in doing this it is carrying out the undertaking of the government when it intervened in the first instance so that a public financial crisis would be avoided. This factor therefore also favors a finding of organ status.

c. *The Degree of Supervision by the Government*

As suggested by the above discussion, the government has played and continues to play an active role in supervising ICAROM's operations though, as the district court found, the government does not control them on a day-to-day basis. *Id.* at 42. Rather, those responsibilities lie with the administrator, subject only to approval of the High Court, as would be the case for any private insurer in administration under the 1983 Act. Nonetheless, the record supports the district court's finding that the government exercises "a substantial level of oversight and control over all major decisionmaking affecting Icarom's ongoing financial affairs." *Id.* at 44. In addition to the reports and consultation already discussed, the government was involved heavily in the 1990 transaction, which positioned ICAROM as a runoff company. ICAROM's current administrator testified that "in all aspects of dealing with the government . . . they are very much the boss." *Id.* at 1456. A representative of the Minister testified that the Minister requires frequent consultation so that he or she may "answer in Parliament as owners of . . . Icarom." *Id.* at 1294. The government's supervision of ICAROM is therefore substantial, and this factor likewise cuts in favor of a finding of organ status.

d. *The Level of Government Financial Support*

USX argues that the government has not provided financial support to ICAROM for its funding has come from the ICF. Furthermore, the only cost to the government in supporting ICAROM, according to USX, has been the foregone interest on the £ 32 million loan from 1992. As the district court found, however, this understanding of the government's financial relationship to ICAROM ignores the fact that the government, despite not directly funding ICAROM, has "arranged and provided financial support" for ICAROM and, in doing so, has subjected itself to substantial risk. Juris. J.A. at 42. USX's observation that the government never has had to make good on its guarantees is beside the point. The government has assured ICAROM's solvency by indirectly lending it money despite the risk of ICAROM not repaying. Furthermore, the government has guaranteed substantial loans made by private lenders to ICAROM.[20] Finally, the government has lost the use of approximately £ 32 million in foregone interest, which, as the district court noted, amounts to approximately 9% of the total funding obtained to keep ICAROM operating during the relevant time period. The risk the government assumed in arranging financing for ICAROM and its foregoing interest demonstrate that the government provided significant financial support to

[20] That the government guaranteed that the ICF would have sufficient funds to satisfy any obligations under these loans rather than guaranteeing the loans directly is a distinction of little difference inasmuch as in either case the government ultimately bears the risk of default.

ICAROM. This factor therefore also weighs in favor of a finding of organ status.

e. *ICAROM's Employment Policies*

The government does not require ICAROM to hire public employees, nor does it pay its employees' salaries. Although tending to ICAROM has "consumed a significant amount of [the government's] civil servants' time and effort," as the district court found, this observation is of little relevance, as it says nothing about the status of ICAROM's employees. More relevant is the fact that the government approved both the current administrator before the High Court appointed him and the current general manager before the administrator appointed him. Nonetheless, Irish civil servants do not work for ICAROM. ICAROM pays three full-time employees who participate in the company's private pension plan, not a government plan. The employment policies factor therefore weighs against a finding of organ status.

f. *Other Obligations and Privileges Under Irish Law*

ICAROM has no special obligations or privileges under Irish law and this factor weighs against a finding of organ status as in some situations an organ would have such obligations or privileges.

g. *The Ownership Structure of ICAROM*

Although the government does not directly own ICAROM, it indirectly has complete control over ICAROM's shares. Six of ICAROM's shares are held in

trust for the Minister by civil servants. SAT holds all other shares of ICAROM, and the only two shareholders of SAT are also civil servants who hold those shares in trust for the Minister.[21] It is unsurprising, then, that the Irish government believes, as it apparently always has, that it is the owner of ICAROM. This position has been stated in the Certificate of Ownership, *see* Juris. J.A. at 1230-31 ("On 15 March 1985 the Government of Ireland decided to acquire ICI. . . . This legislation . . . was enacted for the purpose of enabling Ireland to own the shares of ICI through the Minister. . . . As successor to the then Minister for Industry, Trade, Commerce and Tourism, I on behalf of Ireland, acquired ownership of the company now called ICAROM PLC . . . . "), as well as in the testimony of an employee of the Minister, *see id.* at 1294 ("The position of Ireland is that we own Icarom."), and of the current administrator, *see id.* at 1342 ("The Republic of Ireland owns ICAROM through SAT. . . . "), and current general manager of ICAROM, *see id.* at 1327 ("Icarom is owned by the Irish government.").

USX attempts to dismiss the significance of Ireland's indirect ownership of ICAROM by pointing out that the administrator with the approval of the High Court, not the Minister, in most respects runs ICAROM on a day-to-day basis and that the Irish government never has claimed to own PMPA/Primor, the only other insurer to be in administration. This argument is entirely off the mark. ICAROM

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[21] ICAROM points out that it is not uncommon for the Irish government to provide for statutory ownership of state-owned corporations in this manner.

does not argue that it is an organ because it is in administration (and therefore must report to the government through the High Court), but rather because Ireland owns it for a purpose set forth by the Irish government. Ireland never has owned or controlled PMPA/Primor, either directly or indirectly, nor has it claimed that PMPA/Primor serves any national interest. Because Ireland has complete control over all shares of ICAROM, albeit through a tiered arrangement involving civil servants who hold their interests in trust for the Minister, this factor weighs in favor of a finding of organ status.[22]

3. *Conclusion Under the Organ Prong of section 1603(b)(2)*

Five factors therefore favor a finding of organ status, while only two disfavor such a finding. Weighing these factors qualitatively as well as quantitatively, we hold that in these circumstances ICAROM clearly is an organ of the Republic of Ireland for purposes of section 1603(b)(2). This holding is consistent with cases from other jurisdictions interpreting the organ prong of the section.

Significantly, in *EOTT,* in which ICAROM was a party, the Court of Appeals for the Ninth Circuit declined to decide whether it is an organ of Ireland but remanded the case to the district court to do so. The court of appeals, nevertheless, observed that certain characteristics favored

[22] As discussed above, consideration of this factor is not inconsistent with *Dole,* a case in which the Supreme Court was confronted with a discrete question of statutory interpretation that does not arise under the organ prong of section 1603(b)(2).

a finding that ICAROM was an organ of Ireland, for example, Ireland did not acquire ICAROM for profit-making purposes, the acquisition was accomplished to further the public interest, Ireland placed its economic and political resources behind ICI, the administrator reports to the Minister, SAT is composed entirely of government employees serving at the behest of the Minister, and ICAROM apparently has been operated as a runoff company.[23] 257 F.3d at 998-99. The only factors that the court identified as weighing against a finding of organ status was the status of ICAROM employees, none of whom are public servants, and ICAROM's status under Irish law insofar as ICAROM is subject to suit in Ireland. This second factor should not be considered part of the organ analysis, because an entity *must* be a separate legal person to fall within the FSIA, and Congress intended that the right to sue and be sued be one factor to consider in deciding whether an entity is a separate legal person.[24] Thus, the court of appeals effectively found that the only factor weighing against a finding of organ status is the status of ICAROM employees.[25]

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[23] The court found the final point to be unclear from the record before it, although it has been clarified in the record before us.

[24] *See* footnote 17, *supra*.

[25] USX argues vigorously that ICAROM should be bound by a letter that it wrote in *EOTT* to the court Indicating that it was not an organ of Ireland. We reject that argument as the court of appeals nevertheless later considered the possibility that it was an organ and ICAROM changed its position and argued for organ status. It seems to us that if the court in which the letter was written did not regard it as binding on ICAROM then neither should we. We are told by the briefs that *EOTT* was settled after the remand to the district court so that the district court did not determine ICAROM's organ status in that litigation.

In *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640-41 (9th Cir. 2003), the same court held that the Resolution and Collection Corporation ("RCC"), a Japanese corporation in the business of purchasing, administering, collecting, and disposing of nonperforming loans purchased from failing institutions, was an organ of the Japanese government. The court so held even though RCC's employees were not civil servants, RCC was a private company engaged in a primarily commercial concern, the government authorized 29 other Japanese companies to collect distressed loans, and RCC was not a public corporation, a designation reserved for corporations established by the Japanese government by special law as instruments for activities required by the state. *Id.* The court found that such considerations were outweighed by the fact that the Japanese Diet created the RCC pursuant to legislation for the purpose of carrying out "Japanese national policy related to revitalization of the Japanese financial system." *Id.* RCC also was funded by the government, collected nonperforming loans at the request of the Deposit Insurance Corporation of Japan ("DICJ"), and engaged in certain unspecified activities that were exclusive to RCC and DICJ. *Id.* Although this case may involve less direct government financial support than was present in *EIE,* it also appears to involve more supervision of the entity's activities as well as complete, although indirect, control of the entity's shares. Here, then, as in *EIE,* it is appropriate to conclude that organ status is warranted.

Kelly involved Al Furat Petroleum Company ("Al Furat"), which was owned 50% by Syrian Petroleum Company ("SPC") (which was 100% owned by the Syrian government), and otherwise owned by two private companies. 213 F.3d at 847. The Court of Appeals for the Fifth

Circuit held that Al Furat was an organ of the Syrian government because a government decree created it for the national purpose of exploring Syria's mineral resources; SPC appointed four of the eight Al Furat board members, generally filling those positions with high-level Syrian government officials; and Al Furat had the exclusive right to explore and develop Syria's identified petroleum reserves. *Id.* at 848. The *Kelly* court, however, did not discuss any other factors. In this case, Ireland acquired ICI to fulfill a national purpose, and although ICAROM has an administrator rather than a board, the current administrator was not appointed until approved by the Minister. Furthermore, Ireland fully controls the shares of ICAROM and has put itself at substantial financial risk in financing ICAROM.

In *Patrickson,* however, the court held that two Israeli chemical companies indirectly owned by the Israeli government were not organs under the FSIA. 251 F.3d at 807-08.[26] The court found that, although Israel created the companies to exploit government-owned Dead Sea resources and although the government had the right to approve the appointment of directors and officers and changes in capital structure, and despite the facts that the companies were obliged to present an annual budget and financial statement to various government ministries and the government could constrain the use of the companies' profits and the salaries of directors and officers, these privileges were "not considerably different from the control a majority shareholder would enjoy under American

[26] On the further appeal of the case in *Dole* the Supreme Court did not consider whether the companies were organs of Israel.

corporate law." *Id.* at 808. The companies were not run by government appointees, their employees were not civil servants, they were not wholly owned by the government, they could sue and be sued, and they did not exercise any regulatory authority. *Id.* The court therefore affirmed the district court's finding that the companies were "independent commercial enterprises, heavily regulated, but acting to maximize profits rather than pursue public objectives." *Id.*

The companies in *Patrickson* must be distinguished from ICAROM in certain important respects. First, Ireland completely controls the shares of ICAROM. ICAROM's administrator, although approved by the High Court under the 1983 Act, was the candidate supported by the Minister. Most importantly, while the companies in *Patrickson* were created for purposes of exploiting Dead Sea resources for profit, a venture that would have been appropriate for undertaking by a private company, Ireland indirectly acquired ICAROM (which then still was ICI) in furtherance of the important national and inherently public interest of protecting the Irish insurance and banking industries from financial disaster and to maintain stability in the Irish economy. We are not aware of anything in the record to support a conclusion that if the government had not intervened to prevent ICI's financial collapse that any private entity would have done so. In this regard, it is telling that when AIB recognized that ICI faced collapse it turned to the government for help and not to the rest of the banking and insurance industries.

Moreover, the government played an integral part in arranging ICAROM's financing and in positioning ICAROM to continue as a runoff company, rather than as an ongoing concern engaged in the sale of insurance

policies for profit. The government did all of this to protect the insurance and banking industries for the benefit of the Irish economy. Thus, while the relevant factors in *Patrickson* favored a finding that the companies were commercial enterprises involved in for-profit activities, the relevant factors suggest in this case that Ireland acquired ICAROM to fulfill a specific national purpose to avoid financial disruption, and that ICAROM therefore engages in a public activity on behalf of the Irish government. The district court thus did not err in finding that ICAROM is an organ of the Republic of Ireland for purposes of section 1603(b)(2) and therefore the case properly was removed under section 1441(b) and the district court was correct in denying the motions to remand.

B. *THE MERITS*

In considering the merits of this case we exercise plenary review both because this is an appeal from an order for summary judgment, *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 87 (3d Cir. 2000), and because we are concerned with the interpretation of insurance policies. *Medical Protective Co. v. Watkins,* 198 F.3d 100, 103 (3d Cir. 1999). We have considered the district court's opinion on the motion for summary judgment and are in full agreement with the result the court reached and cannot add significantly to the opinion. Accordingly, we will affirm the order for summary judgment without discussion except to take note of the district court's recognition of our opinion in *Bensalem Township v. International Surplus Lines Insurance Co.,* 38 F.3d 1303, 1309 (3d Cir. 1994), emphasizing the significance of the reasonable expectations of the insured in ascertaining the meaning of an insurance policy. *USX,* 99 F. Supp. 2d at

610. We think it plain that USX could not reasonably have expected when it obtained its insurance policies or at any later time to have the coverage it sought in this case for the consequences of its wrongful activities. While we are aware that USX obtained and paid for broad coverage it should have recognized that there was some limit to it and we regard its substantive contentions, though complex, as not meritorious.

III. CONCLUSION

For the foregoing reasons we will affirm the orders of April 1, 1996, March 22, 2000, and September 11, 2002.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

USX CORPORATION and BESSEMER AND LAKE ERIE RAILROAD COMPANY,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 95-866
ADRIATIC INSURANCE COMPANY, et al.,	)	
Defendants.	)	
v.	)	
ICAROM, Formerly known as INSURANCE CORPORATION OF IRELAND,	)	
Additional Defendant.	)	

OPINION

DIAMOND, D.J.

Plaintiffs commenced this action seeking indemnification under approximately 278 umbrella and excess policies of insurance for incurred financial losses in excess of $590,218,296.92 which plaintiffs were required to pay as a result of judgments and settlements following the entry of a criminal conviction and civil judgments against plaintiff Bessemer & Lake Erie Railroad Company ("B&LE") based upon its participation in a twenty year conspiracy to violate federal and state antitrust laws. Presently before the court are plaintiffs' motion to remand and a number of

other motions pertaining to this court's subject matter jurisdiction. For the reasons set forth below, plaintiffs' motions to remand will be denied.

Plaintiffs initially filed this action in the Court of Common Pleas of Allegheny County, Pennsylvania, on March 31, 1995, seeking indemnification from the defendant insurers under the same policies at issue in this action. Plaintiffs' initial action named as a defendant ICAROM plc ("ICAROM"), successor to the Insurance Company of Ireland ("ICI").[1] ICAROM removed the original action to this court on the basis that it qualified as a "foreign state" within the meaning of 28 U.S.C. §1441(d).[2] On May 18, 1995, plaintiffs voluntarily dismissed the original complaint without prejudice and initiated the instant action in the Court of Common Pleas of Allegheny County by filing an identical complaint except that it excluded as a defendant any entity which qualified as an

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[1] ICAROM was not identified by its corporate name but was named by reference due to the policies identified in the original complaint. From 1979 to 1982, ICI participated with certain underwriters at Lloyd's, London, and other companies in the London insurance market in subscribing to shares of liability in at least six excess policies of insurance issued to plaintiff USX Corporation. The six policies either sit below or share in the same layer of coverage with policies issued by Continental Insurance Company ("Continental"), Federal Insurance Company ("Federal") and Norfolk Insurance Company, whose policies are identified in the original and instant action.

[2] This removal statute provides in pertinent part:

> Any civil action brought in a state court against a foreign state as defined in Section 1603(a) of this Title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. . . .

28 U.S.C. §1441(d).

"agency or instrumentality of a foreign state" within the meaning of 28 U.S.C. §1603.[3]

On June 6, 1995, defendants Allstate Insurance Company (as successor to Norfolk Insurance Company) ("Allstate"), Continental and Federal each filed separate third-party complaints joining ICAROM as an additional defendant to the instant action. The third-party complaints joined ICAROM on the bases that it was "a necessary party for the full and final adjudication" of each third-party plaintiff's rights and that ICAROM may be required to provide "contribution, indemnification, subrogation or apportionment" to each third-party plaintiff. On June 7, 1995, ICAROM removed the instant action pursuant to 28 U.S.C. §1441(d). Plaintiff filed the instant motion to remand, contending, *inter alia*, that ICAROM has been improperly joined and that it cannot meet its burden of establishing that it is an agency or instrumentality of a foreign state within the meaning of the FSIA. Plaintiffs

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[3] The referenced statute is part of the Foreign Sovereign Immunities Act ("FSIA"), and provides in pertinent part:

> (a) A "foreign state" . . . includes . . . an agency or instrumentality of a foreign state as defined in subsection (b).
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> (b) An "agency or instrumentality of a foreign state" means any entity –
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> > (1) which is a separate legal person, corporation or otherwise and
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> > (2) . . . a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof and
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> > (3) which is neither a citizen of a state of the United States . . . nor created under the laws of any third country.

28 U.S.C. §1603(a) & (b) (1994).

further contend that ICAROM has waived any right to remove pursuant to the service of suit clause contained in the policies to which it subscribed.

On July 18, 1995, an order was entered directing counsel for ICAROM, Allstate, Continental and Federal to file a joint response to plaintiffs' motion to remand. Allstate, Continental and Federal allege that the joinder of ICAROM is proper because (1) they may have a right to contribution from ICAROM and (2) ICAROM is a necessary party because the layers of coverage to which ICAROM subscribed must be exhausted before the third-party plaintiffs' policies are obligated to respond to plaintiffs' losses. In addition, all responding defendants contend that ICAROM is an instrumentality of a foreign state, that the United States Court of Appeals for the Third Circuit's ruling in *In re Texas Eastern Transmission Corp. PCB Contamination Ins. Coverage Litigation*, 15 F.3d 1230 (3d Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 291 (1994), recognizes ICAROM's unqualified right to remove, that the service of suit clause does not work a waiver of ICAROM's right and that plaintiffs have failed to establish that the joinder of ICAROM was collusive.

Plaintiffs' instant complaint seeks damages for breach of contract from each named defendant under the respective policies, subject to the monetary limits of those policies, together with prejudgment and post-judgment interest. The underlying third-party claims which gave rise to plaintiffs' liability are identified in the instant complaint as "the MDL No. 587 liability." The complaint alleges that between 1982 and 1984, numerous third-party plaintiffs filed ten separate civil suits in various United States District Courts against several railroad companies that carried iron ore from lower Lake Erie ports. These

complaints alleged that the railroads had engaged in a conspiracy, dating back to the 1950s, to prevent self-loading vessels, non-railroad owned docks and trucking firms from participating in the transportation of iron ore from the upper Great Lakes and Eastern Canada to discharge ports on the lower Great Lakes, the Detroit River and steel mills in Ohio, Pennsylvania and West Virginia. These third-party actions were consolidated by the United States Judicial Panel on Multi-District Litigation and transferred for pretrial proceedings to the United States District Court for the Eastern District of Pennsylvania. Each complaint asserted that B&LE, in conjunction with other railroads, had violated the Sherman Act and the Ohio Valenteen Act. In nine of the ten cases, jury verdicts were rendered finding that B&LE had participated in an unlawful conspiracy which injured the MDL plaintiffs. In eight of the cases, the jury assessed substantial damages against B&LE for losses suffered through 1983. Final judgments were entered on June 17, 1991, which resulted in a total liability of $457,652,953.00 (exclusive of interest, costs and attorneys' fees). These judgments reflected the trebling of damage awards under the Federal Antitrust Laws, the doubling of damage awards under the Ohio Valenteen Act and set-offs equivalent to the aggregate amount of each MDL-plaintiff's settlements with other defendants.[4] On May 27, 1993, the United States Court of Appeals for the Third Circuit rendered an opinion affirming the district court's judgments

[4] Each MDL plaintiffs also was awarded interest at a rate of 8.16% compounded annually through July 19, 1989, as well as costs and attorneys' fees.

against B&LE. *See In re Lower Lake Erie, Iron Ore Antitrust Litigation*, 759 F.Supp. 219 (E.D.Pa. 1991), *aff'd in part, rev'd in part*, 998 F.2d 1144 (3d Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 625 (1994).[5] Beginning in late 1993 and continuing through 1994, plaintiffs satisfied the judgments.

Plaintiff USX seeks indemnification for the above-referenced loss from the insurers participating in its umbrella liability insurance program for seven policy periods between May 12, 1977 and April 1, 1983. The May 12, 1977, through June 1, 1978, program included five layers of insurance providing $128.1 million of coverage for liability imposed against USX in excess of a $50 million self-insured retention. The June 1, 1978, through June 1, 1979, program included six layers of insurance providing $151 million of coverage in excess of a $50 million self-insured retention. The June 1, 1979, through December 1, 1979, program included four layers of insurance providing $150 million of coverage in excess of a $50 million self-insured retention. The December 1, 1979, through December 1, 1980, program included six layers of insurance providing $275 million of coverage in excess of a $25 million self-insured retention. The December 1, 1980, through December 1, 1981, program included seven layers of insurance providing $275 million of coverage in excess of a $25 million self-insured retention. The December 1, 1981, through April 1, 1982, program included seven layers of insurance providing $325 million of coverage in excess of a $25 million self-insured retention. The April 1,

[5] One case was remanded for a new trial on damages.

1982, through April 1, 1983, program included six layers of insurance providing $325 million of coverage in excess of a $25 million self-insured retention.

Plaintiffs attached to their complaint two first layer umbrella policies which allegedly provide the terms and the conditions under which the vast majority of the defendant insurers are obligated to provide coverage. These policies are identified as the underlying Lloyd's policies and the Northbrook policy.[6] As previously noted, ICI subscribed to at least six contracts of insurance which either sit directly below or share in the same layer of coverage with policies issued by Continental, Federal and Allstate and which allegedly follow the form of the Lloyd's policies. The Lloyd's policies are the lead umbrella policies in six of the seven policy periods set forth in the complaint.

Plaintiffs plead that the conspiracy in which B&LE engaged constituted "an occurrence" within the meaning of all the policies at issue and that the occurrence "triggered the coverage obligations for each of the defendants' policies in effect for each of the policy periods identified above. . . ." Complaint at ¶¶171-72. Plaintiffs further allege that the loss is covered by each definition of damage in the policies.[7] Plaintiffs further contend that proper notice was

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[6] The first layer policies are umbrella comprehensive general liability policies. Plaintiffs allege that they reached agreement with each and every other defendant that all policies in or above the first layers for the seven policy periods would be consistent with and follow the form of these underlying policies.

[7] The underlying policies provide coverage for property damage, personal injury and advertising liability. Plaintiffs allege, *inter alia*, that the conspiratorial conduct constituted advertising liability within the meaning of the policies because the liability arose from "unfair

(Continued on following page)

given or that the lack of notice did not cause prejudice to the defendants. Plaintiffs plead that they did not expect or intend the ultimate result of the underlying conduct and that coverage cannot be withheld under any exclusion in the policies. Based on the above, plaintiffs allege that each defendant is obligated to indemnify USX and/or B&LE for the losses arising from the judgments in the MDL litigation and pray for damages under each respective contract of insurance.

Plaintiffs contend that ICAROM was not properly joined in the state action under Pennsylvania Rule of Civil Procedure 2252(a) and accordingly lacks standing to invoke federal jurisdiction. Plaintiffs reason that the contractual obligations which each defendant owes to plaintiffs are independent of any obligation that ICAROM could owe to plaintiffs because the third-party plaintiffs have not paid and cannot be required to pay any amounts over and above those which they respectively are obligated to pay under their separate contracts of insurance. Plaintiffs

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competition" as set forth in the definition of advertising liability. Plaintiffs further allege that the liability arose from the publication or advertising of the prohibitive railroad rates and charges, which were incorporated in tariffs filed by the Interstate Commerce Commission and published in trade journals, and that these rates and charges were the "advertising activities" of B&LE. Plaintiffs also allege that the liability constitutes "discrimination" under the definition of personal injury because, *inter alia*, the conduct constituted a form of economic discrimination, including the practice on the part of common carriers of demanding without justification different rates or charges for substantially the same service or the same rate for substantially different levels of service. Finally, plaintiffs alleged that the liability constitutes property damage because, *inter alia*, B&LE's conspiratorial conduct resulted in a diminution in the value of the third-parties' tangible property caused by a loss of use.

further assert that under the precedent established in *Gould, Inc. v. Continental Casualty Co.*, 585 A.2d 16 (Pa.Super. 1991), Pennsylvania does not recognize a defendant's right to seek contribution, indemnification, subrogation or apportionment among insurers where a plaintiff is seeking to enforce its rights pursuant to independent contracts of insurance.

Pennsylvania Rule of Civil Procedure 2252(a) provides in pertinent part:

> (a) . . . any defendant or additional defendant may join as an additional defendant any person, whether or not a party to the action, who may be . . . (3) jointly or severally liable with the joining party on the plaintiff's cause of action, or (4) liable to the joining party on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the plaintiff's cause of action is based.

Pa.R.Civ.P. 2252, 42 Pa.C.S. Pennsylvania courts have noted that Rule 2252 ("is to be broadly construed to effectuate its purpose of avoiding multiple lawsuits by settling in one action all claims arising out of the transaction or occurrence which gave rise to the plaintiff's action." *Gordon v. Sokolow*, 642 A.2d 1096, 1099 (Pa.Super. 1994). Thus, joinder is appropriate "as long as the additional defendant's alleged liability is related to the claim which the plaintiff asserts against the original defendant." *Id.* (*citing Olson v. Grutza*, 631 A.2d 191, 197 (Pa.Super. 1993). Where joinder is based upon joint and several liability and contribution, "the only substantive limitation placed upon the right to join an additional defendant . . . is that liability must be premised on the same cause of action alleged by the plaintiff in his or her complaint." *Id.* (*quoting*

Svetz for Svetz v. Land Tool Co., 513 A.2d 403, 405 (Pa.Super. 1986), *allocatur denied*, 527 A.2d 544 (1987)).

Moreover, the phrase "cause of action" is likewise broadly construed and requires only that the "additional defendant's liability be related to the original claim which plaintiff asserts against the original defendant." *Id.* (*citing Somers v. Gross*, 574 A.2d 1057, 1058 (Pa.Super. 1990)). Thus, joinder is inappropriate where the allegations contained in the third-party complaint are based upon separate and distinct legal claims, which relate to different harms to be proved with different evidence or which involve different transactions or occurrences happening at different times. *Olson*, 631 A.2d at 196-98 (contrasting cases where joinder was permissible under Rule 2252 with cases where joinder was held improper); *Gordon*, 642 A.2d at 1100 (same). Joinder is appropriate, however, as long as the original defendant's complaint against the additional defendant is related in substance to the causes of action set forth by the plaintiffs' complaint and arises from the same factual scenario set forth therein. *Id.* This is true even where the original defendant has the burden of establishing an affirmative fact in order to uphold a valid cause of action against the party sought to be joined. *Id.* at 1102.

Plaintiffs' reliance on *Gould* in support of the contention that Pennsylvania law forecloses the joinder of ICAROM under the instant circumstances is misplaced. In *Gould*, the Superior Court affirmed he trial court's dismissal of an excess carrier's third-party complaint against a primary insurer. Gould had commenced an action against National Union Fire Insurance Company of Pittsburgh ("National Union") and several other insurance companies seeking indemnification for sums Gould paid in

settlement of claims brought by its former employees who had suffered injuries due to the exposure of heavy metals at a plant which was operated by Gould and its predecessor from 1946 to 1979. Gould sought coverage from National Union for 20% of the second layer of excess insurance for a particular policy period. The limits of the underlying insurance had been exhausted. Gould demanded indemnification from National Union.

National Union sought to join Travelers Insurance Company ("Travelers") under Pa.R.Civ.P. 2252(a) "on the basis that Travelers also provided insurance to [plaintiff and its predecessors] some time during the 33 year period in question." *Id.* at p. 17. National Union claimed entitlement to contribution from Travelers for amounts National Union would be required to pay pursuant to Gould's action. Travelers filed preliminary objections, alleging that all issues regarding outstanding coverage between Travelers and Gould were settled in exchange for a $600,000.00 payment made by Travelers to Gould. As part of the settlement agreement Gould had agreed that it would indemnify or credit Travelers for any amount as to which Travelers would otherwise be responsible, whether the amount was less than, equal to or more than the $600,000.00 that Travelers had paid. The trial court granted Travelers' preliminary objections, reasoning that under the circumstances Travelers could not be compelled to pay National Union for any additional portion of the loss and that there could be no prejudice suffered by any of the other insurers because they would receive credit for any amounts attributable to Travelers.

On appeal the Superior Court noted that the joinder of Travelers was improper "on the basis that Travelers is solely liable or jointly and severally liable along with

National Union to Gould, or liable over to National Union on the cause of action in contract, as Travelers was not a party to the insurance contract between Gould and National Union." *Id.* at p. 18. The court reasoned that because Gould had released Travelers and discharged it from all liability, Union National's third-party complaint set forth a separate cause of action involving the insurers' rights pursuant to the settlement agreement and the separate policies of insurance issued to Gould. The court opined that under the circumstances National Union would be entitled to prorate any applicable limits and to receive credit for amounts paid by Travelers before National Union's liability to Gould would be determined and therefore National Union could not be prejudiced by the absence of Travelers. *Id.* at 19.

The Supreme Court of Pennsylvania adopted a different approach in allocating liability among insurers on the risk in *J.H. France Refractories v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993). There, the insured commenced a declaratory judgment action for the purpose of determining multiple insurers' duties to defend and indemnify under separate policies of insurance for multiple third-party claims based upon asbestos related injuries. Six separate carriers had provided primary coverage to the plaintiff during a period which spanned approximately 17 years. The trial court and the Superior Court had employed a multiple-trigger theory, concluding that exposure, progression and/or manifestation triggered the duty to defend and indemnify under the policies. The Supreme Court affirmed the use of the multiple-trigger theory under the circumstances.

The second issue raised was "how to allocate the liability of each insurer when, as is commonly the case,

more than one insurer was on the risk at one time or another during the [covered injury]." *Id.* at 507. The Superior Court had adopted a scheme whereby the several insurers on the risk during the relevant time period "would share the obligation to indemnify on a prorata basis apportioned upon the amount of time each policy was in effect, including an obligation of [plaintiff] to act as a self-insurer during the periods when it was uninsured." The Supreme Court of Pennsylvania rejected this approach and held that "once the liability of a given insurer is triggered, it is irrelevant that additional exposure or injury occurred at times other than when the insurer was on the risk. The insurer in question must bear the potential liability for the entire claim." *Id.* at 508.

In support of its decision, the Supreme Court first noted that each insurer obligated itself to "pay on behalf of the insured *all sums* which the insured shall become legally obligated to pay as damages because of [a covered injury]." *Id.* at 507. (emphasis in original). Relying on *Keene Corp. v. Insurance Co. of North American*, 667 F.2d 1034 (D.C.Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), the court emphasized that there was nothing in the policies that provided for a reduction of the insurer's liability if an injury occurs only in part during a policy period.[8] The court also observed that there was insufficient

[8] The *Keene* court had interpreted the all sums language as covering an entire liability once a policy is triggered by a single occurrence because "the primary duty of the insurers whose coverage is triggered . . . is to ensure that Keene is indemnified in full." *Keene*, 667 F.2d at 1059. The other insurance provisions and related contribution formulas are to be used to allocate liability among the insurers thereafter. *Id.*

evidence to substantiate the assumption that the progression of the injury triggering coverage was linear in character and reasoned that there was no basis to conclude that the insured should be straddled with a prorata apportionment of liability for periods during which it was uninsured because to do so would create a judicial fiction that the insured was self-insured under a policy of insurance which did not exist. Finally, the court supported its joint and several approach on the basis of the definition of "occurrence," which included "continuous or repeated exposure to conditions which result in [a covered injury]." The court opined:

> If prolonged exposure, constituting one occurrence, resulted in an injury, and if the injury occurred during the time a given policy was in effect, then the injury is an insurable risk under the terms of that policy. Being defined as one "occurrence" the entire injury, and all damages resulting therefrom, fall within the indemnification obligation of the insurer. In other words, once the liability of a given insurer is triggered, it is irrelevant that additional exposure or injury occurred at times other than when the insurer was on the risk. The insurer in question must bear potential liability for the entire claim.

Id. at 508. Thus, the insured was "free to select the policy or policies under which it is to be indemnified" in order to accord the insured the coverage promised by the various policies. *Accord ACandS, Inc. v. Aetna Casualty & Surety Co.*, 764 F.2d 968, 974 (3d Cir. 1985) (predicting in progressive injury case that the Supreme Court of Pennsylvania would hold "all sums" language in standard comprehensive general liability policy imposes joint and several liability on all insurers on the risk, and rejecting

any proration of losses, reasoning that it is irrelevant to insurers' liability that the injury was caused in part during another policy period); *see also New Castle County v. Continental Casualty Co.*, 725 F.Supp. 800, 817 (D.Del. 1989), *aff'd in part and remanded*, 933 F.2d 1162 (3d Cir. 1991), *cert. denied*, 506 U.S. 1030 (1993) (terms of insurance policy are not affected by prior or subsequent coverage; there is no proration of losses once the policy is triggered by pollution from landfills).

In light of the insurers' primary duty, the Supreme Court opined:

> When the policy limits of a given insurer are exhausted, [the insured] is entitled to seek indemnification from any of the remaining insurers which was on the risk during [the time period during which coverage was triggered]. Any policy in effect during the period from exposure through manifestation must indemnify the insured *until its coverage is exhausted.*
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> We believe this resolution of the allocation of liability issue to be most consistent with the multiple-trigger theory of liability.
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> This conclusion does not alter the rules of contribution or the provisions of "other insurance" clauses in the applicable policies. There is no bar against an insurer obtaining a share of indemnification or defense costs from other insurers under "other insurance" causes or under the equitable doctrine of contribution.

Id. at 509 (emphasis added).

The above precedent establishes that under Pennsylvania law there is joint and several liability imposed upon

all primary insurers whose policies are triggered by a single occurrence giving rise to covered damages in the form of a progressive and indivisible injury. Under Pennsylvania's joint and several liability approach, each of the insurers found to be on the risk may be compelled to satisfy an insured's claim for indemnification even though other insurers may be responsible to provide indemnification for the same loss. Accordingly, an insured's ability to recover from a primary insurer whose policy is on the risk is not restricted by the fact that other insurers whose policies also are on the risk may be in whole or in part responsible for indemnification. Instead, that assessment is to be made among the various insurers once the insured's right to indemnification has been satisfied.

Although it is unclear at this juncture whether a similar scheme of allocation will be appropriate in the instant matter, a review of plaintiffs' complaint belies any contention that ICAROM was joined improperly. Plaintiffs' complaint seeks to trigger 278 policies of insurance spanning seven policy periods and providing approximately $1,629,100,000.00 in coverage. The complaint raises substantial issues as to whether the loss or any portion of it can constitute a covered injury and asserts that the entire loss has been caused by a single occurrence. In light of the vertical layers of excess insurance and scope of coverage placed into issue, it is readily apparent that plaintiffs seek to pursue a construction of the policies which will vertically trigger coverage for the loss. Whether such a construction would be appropriate in light of the terms and conditions of the contracts and the circumstances constituting the loss raises numerous factual and policy construction issues, including *inter alia*, whether

there is a covered loss, whether the loss arises from a single occurrence, whether any covered injury is indivisible and progressive, whether any such loss is excluded in whole or in part, whether all conditions have been satisfied legally and so forth. The breadth and allegations of the complaint likewise raise unsettled issues of Pennsylvania law. *Compare Continental Casualty Co. v. Armstrong World Industries*, 776 F.Supp. 1296, 1301 (N.D.Ill. 1991) (interpreting Pennsylvania and Illinois law as consistent and requiring an exhaustion by layers (i.e., all applicable primary coverage must be exhausted before reaching first layer umbrella excess policies and so forth) (*citing* 8A Appleman, *Insurance Law and Practice*, §4096, at 348, §4909.85, at 453-4 (1981) (umbrella excess policies are designed to afford coverage only when all other types of insurance are exhausted)); *General Refractories Co. v. Allstate Ins. Co.*, No. 89-7924 (E.D. Pa. June 8, 1994) (same); *with Dayton Independent School Dist. v. National Gypsum CO.*, 682 F.Supp. 1403, 1411 N.23 (E.D. Texas 1988), *rev'd on other grounds sub nom., W.R. Grace v. Continental Casualty Co.*, 896 F.2d 865 (5th Cir. 1990) ("once the limits immediately underlying a given excess policy are exhausted, [the insured] may call upon that excess policy to provide coverage"); B. Osrager and T. Newman, *Handbook on Insurance Coverage Disputes* §13.14 at 639-41 (8th ed. 1995) (*citing Dayton* in contrasting horizontal versus vertical exhaustion requirement of underlying insurance and noting growing authority for vertical exhaustion where single occurrence results in progressive injury); *Texas Eastern*, 15 F.3d at 1242 n.12 (acknowledging defense counsel's representation that if there were a finding of multiple occurrences the loss "is spread numerous times over the primary and low-layer excess companies and would never come up vertically to

the higher layer excess insurers[.]" whereas a finding of a single occurrence would result in the insured's loss of $750 million running vertically); *Air Products & Chemicals v. Hartford Accident and Indemnity Co.*, 25 F.3d 177, 181 (3d Cir. 1994) (noting holdings as to joint and several approach and allocation in *France* and remanding for further consideration; "[u]nder *France III*, the allocation applies to the duty to *indemnify*, if more than one policy is triggered, the *insured* 'should be free to select the policy or policies under which it is to be indemnified' "); *cf. Gould*, 585 A.2d at 17-19 (insured may pursue indemnification from excess carrier where underlying policies have been exhausted even though other primary carriers in other policy periods may be in whole or in part responsible for the loss). In light of the substantial issues of fact and unsettled issues of law raised by the far-reaching allegations of the complaint, it cannot be said as a matter of law at this juncture that a claim for contribution cannot arise.[9]

Moreover, unlike the third-party defendant sought to be joined in *Gould*, ICAROM subscribed to shares of

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[9] For instance, if plaintiffs were ultimately to establish factually and legally that vertical exhaustion is appropriate, any insurers called upon to satisfy the loss *may* have a contribution claim for a portion of the judgment against any non-contributing defendant whose liability conclusively has been established on the record. The right of contribution may arise pursuant to the contractual provisions in the instruments at issue or other equitable factors. *See* Conditions K ("Other Insurance") and L ("Subrogation") of the Lloyd's policies at p. 11 of Exhibit A to complaint. Thus, if the third-party plaintiffs are required to indemnify plaintiffs to the limits of their policies based upon their obligations to the insured, contractual or equitable apportionment rights may arise against any non-contributing defendant, which would include ICAROM under such circumstances.

liability insurance during the same policy periods placed at issue pursuant to policies allegedly following the form of the terms and conditions placed in issue. ICAROM's liability to the third-party plaintiffs will be premised on the same terms and conditions governing each third-party's liability to the plaintiffs. The underlying facts governing any cognizable claim of contractual or equitable contribution, should one ultimately arise, will be those which will govern the third-party plaintiffs' liability to plaintiffs, although the assessment and application of the facts may be different. The terms and conditions of the instruments which will govern any such claim have been placed at issue. Thus, the claims for contribution are based upon the same transaction and occurrence giving rise to plaintiffs' compliant and are premised on the same cause of action set forth therein. It follows that the third-party plaintiffs are entitled under Pennsylvania law to pursue a claim against ICAROM under the doctrine of equitable contributions or the terms and conditions of the policies at issue and that ICAROM has been joined properly because its joinder is necessary to protect ICAROM's rights.[10]

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[10] Plaintiffs' styling of the complaint as seeking breach of contract damages under each separate policy does not alter this conclusion. The fact that plaintiffs may establish that they are entitled to complete relief without calling upon ICAROM specifically to perform its contractual obligations is inapposite. By necessity, the relief requested will require a binding construction of the policies. The rights of any party to instruments which directly follow the form of the Lloyd's policies during the policy periods at issue will be affected. The courts which thoroughly have considered similar issues have concluded that such parties are at a minimum necessary parties who should be joined if practicable. *See Shell Oil Co. v. Aetna Casualty & Surety Co.*, 158 F.R.D. 395, 400-02 (N.D.Ill. 1994) (absent excess carriers whose policies were in same layer or directly underlying named excess carriers were necessary and

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Plaintiffs also contend that ICAROM does not qualify as a foreign state under the FSIA. Defendants aver that the state of affairs surrounding the ownership of ICAROM establishes that it is a foreign state within the meaning of the FSIA and that the United States Court of Appeals for the Third Circuit has recognized ICAROM's absolute right

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indispensable parties in action seeking determination of coverage and its extent because court would be required to construe absent excess carriers' policies in making determination that named carriers' policies were triggered and obligated to respond to the loss, that conditions and exclusions in absent carriers' policies did not preclude right to indemnification, that exhaustion requirement was satisfied, and so forth; although absent excess carriers would not be "technically bound" by such a determination, absent excess carriers would be prejudiced by loss of "the opportunity to present their arguments regarding the interpretation of their policies at the time they would be most forceful" and there was a potential for prejudice to the named defendants based upon possible inconsistent interpretations and judgments as a result of subsequent litigation and the practical effect of the contingent and advisory rulings on the named carriers' policies which were in the same layer or directly above absent excess carriers' policies); *Littleton, Colorado v. Commercial Union Assurance Co.*, 133 F.R.D. 159, 162-63 (D.Col. 1990) (in action seeking binding adjudication of the existence of coverage under nearly identical policies, the interpretation of which presented overarching legal question, the failure to join insurer underlying named excess carriers during the same policy period placed in issue constituted failure to join necessary and indispensable party because determination of excess carriers' obligations as to coverage and its extent necessarily required construction of absent carrier's policy underlying excess carriers' policies, making construction contingent and creating risk of duplicative litigation and inconsistent judgments). Moreover, all that is required under Rule 2252 is that the claim for contribution be premised upon the same cause of action set forth in the complaint, that the third-party defendant may be jointly and severally liable to the plaintiff based upon the outcome of the litigation and that the factors necessary for resolution of the claim for contribution do not extend beyond the same transaction and occurrence giving rise to the complaint. Those factors are satisfied here.

to invoke federal jurisdiction in *In re Texas Eastern Transmission PCB Contamination Ins. Coverage Litigation*, 15 F.3d 1230 (3d Cir. 1994).

Texas Eastern involved the consolidation of three separate actions. One of the actions was captioned *Associated Electric & Gas Insurance Services Ltd. v. Texas Eastern Transmission Corp.* (*"AEGIS"*), and was filed by two of Texas Eastern's excess carriers in the United States District Court for the Eastern District of Pennsylvania. Jurisdiction was founded upon the FSIA based upon ICI being joined as a defendant with Texas Eastern.[11] Two pertinent issues were addressed on appeal: ICI's status as a foreign state under §1603 and the standard applicable for assessing whether there is an adversity of interest which satisfies the requirement that the action be "against" a foreign state. After considering affidavits, the district court had determined that the Republic of Ireland's administration of ICI converted it to a foreign state in light of the following: (1) that ICI is a corporation organized and existing under the laws of the Republic of Ireland; (2) that in March 1985, the government of Ireland acquired 100% of the shares of ICI through a wholly-owned corporation which has thereafter been operated by an administrator appointed by the government of Ireland; (3) that although the government of Ireland's administration of ICAROM is similar to a Chapter 11 proceeding

[11] The third action was commenced by Texas Eastern in Harris County Texas against all its insurers. ICI removed the action to the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. §1441(d). The action was transferred to the Eastern District of Pennsylvania and consolidated with the *AEGIS* action. The basis for removal likewise was ICI's foreign state status.

under the United States Bankruptcy Laws, the administrator is vested with the powers of management and shareholder; (4) that in return for the ministry of industry and commerce of Ireland's guarantee of certain debts of ICI, all shares of ICI were transferred to Sealachais Archais Teoranta ("SAT"); (5) that the sole shareholders and directors of SAT are two officials of Ireland's Department of Industry and Commerce; (6) that the minister is authorized to hold and sell all shares of SAT, to exercise all of the rights and powers of the shareholders and to receive all dividends; and (7) that any dividends received or profits made go to the Exchequer of Ireland. Based on this, the district court concluded:

> Thus it seems clear that although ICI may be under the administration of the Courts for some purposes, a majority of the shares of ICI, "or other ownership interests" is owned by the Republic of Ireland. The statute provides that it be a majority of the shares or other ownership interest. Since SAT owns 100 percent of ICI's shares and SAT is 100 percent owned and controlled by the Republic of Ireland through its Minister of Industry and Commerce, and the sole shareholders and directors of SAT are officials of the Department of Industry and Commerce, there is a direct and complete ownership of ICI by the Republic of Ireland for purposes of 28 USC Section 1603.

In upholding jurisdiction, the *Texas Eastern* court concluded that the factual determinations leading to the district court's finding that ICI qualified as a foreign state

were not clearly erroneous. *Texas Eastern*, 15 F.3d at 1238 n.8.[12]

Texas Eastern also argued that the defendant insurers should have been realigned as plaintiffs to reflect their alleged substantive party designations, making the suit no longer "against" a foreign state and thus depriving the district court of subject matter jurisdiction. *Id.* at 1239. In support of this contention, Texas Eastern asserted that the primary purpose of the *AEGIS* action was to obtain a declaration that Texas Eastern was not entitled to coverage under any policies issued by its excess carriers and that ICI had a common interest with the excess carriers on the primary issue against Texas Eastern. Texas Eastern argued that accordingly ICI should have been realigned as a plaintiff, which would result in the action not being against a foreign state. Two members of the *Texas Eastern* panel disagreed.

The court first noted that it is now "widely recognized that in enacting the FSIA and related statutory

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[12] The determination that the equitable administration of ICI by the Republic of Ireland satisfies the ownership requirement of §1603 has been the subject of substantial controversy. Some district courts have rejected ICI's contention that it qualifies as a foreign state. *See Mobil Corp. v. Abeille General Insurance Co.*, 984 F.2d 664 (5th Cir. 1993) (holding that 28 U.S.C. §1447(d) prohibited review of district court's determination that administration of ICI was insufficient basis upon which to establish subject matter jurisdiction under the FSIA); *Murphy Oil USA, Inc. v. United States Fidelity & Guaranty Co.*, 1992 WL 465701 (W.D. Ark. 1992) (concluding that ICI was not foreign state within meaning of §1603); *Aluminum Company of America v. Admiral Insurance Co.*, No. C93-32C, slip op. (W.D. Wash. April 9, 1993) (holding that *Mobil* and *Murphy Oil* precluded relitigation of ICI's ability to invoke subject matter jurisdiction under the FSIA).

amendments, Congress sought to create a new division in addition to federal question and diversity subject matter jurisdiction and that the FSIA was promulgated in response to unique policy considerations involving the international relations of the United States with foreign sovereigns." *Id.* at 1239. This new basis for federal subject matter jurisdiction reflects deliberate congressional intent to circumvent the interference with foreign relations caused by the lack of uniformity and local bias in civil case law by channeling private actions against foreign sovereigns into federal courts. "Thus, the FSIA establishes the federal district courts as the forum preferred by Congress for bringing suit against a foreign state, and the policy of 'jealous restriction' which has characterized application of the diversity statute is not operative in the FSIA context." *Id.*

In assessing the parties' actual adversity of interests for purposes of determining whether there is a statutory basis for jurisdiction under the principles of realignment, the court rejected the "primary purpose" test used in diversity cases as antithetical to the purposes of the FSIA and adopted the more lenient "substantial controversy" test to determine jurisdiction where multiple claims are pleaded. It noted:

> Under the "substantial controversy" ranking of issues standard, the court determines, as a precursor to potential realignment, which of the conflicts asserted in the litigation are merely "substantial," and then whether the parties in question are really opposed according to their true interests in any of their substantial conflicts. Under this standard, it would not defeat jurisdiction if there were no statutory basis for jurisdiction on the primary issue in the litigation,

> as long as the statutory elements of jurisdiction were present on any other "substantial" issue.

Id. at 1241. In applying the substantial controversy standard, the court reasoned that AEGIS had sought an adjudication of its rights and obligations *inter se* with respect to Texas Eastern's other insurers, including ICI, through a declaration of entitlement by way of contribution or indemnification, thus subjecting ICI to potential liability. The court concluded that "while on the primary issue in *AEGIS* there is not a collusion of interest between AEGIS and ICI, there is certainly an element of adversity between AEGIS and ICI sufficient to satisfy §1330's requisite that an action be brought 'against' a foreign sovereign." *Id.* at 1242. Thus, subject matter jurisdiction was proper over the entire AEGIS case.

Plaintiffs contend that the determination that ICI was a foreign state within the meaning of the FSIA in *Texas Eastern* is not binding precedent on the issue of whether the current ownership of ICAROM constitutes a sufficient basis to invoke subject matter jurisdiction and that ICAROM cannot meet its burden of demonstrating that it is a foreign state because facts not considered in *Texas Eastern* and subsequent changes in the management of ICAROM eviscerate its foreign state status.

The removing defendant has the burden of demonstrating that subject matter jurisdiction exists. *Development Finance Corp. v. Alpha Housing & Health Care, Inc.*, 54 F.3d 156, 158 (3d Cir. 1995). A declaration by Brendan

Murphy establishes the following.[13] The Irish Government acquired ICI on March 15, 1985, after concluding that due to financial reversals, ICI was unable to meet its obligations to policyholders. Exhibit 1, ¶6 (Murphy Dec.) and Att. B thereto, pp. 1731-32. The Irish Government determined that it was necessary to fund ICI's financial obligations in order to maintain stability in the insurance and banking systems in Ireland. At that time, ICI and Allied Irish Banks ("Allied") were two of the largest insurers and banks in Ireland, respectively. Exhibit 1, ¶6 (Murphy Dec. and Att. C thereto, pp. 697-98. On March 15, 1985, the Republic of Ireland placed ICI under administration and an administrator was appointed by the Irish High Court to provide for the continuation of ICI's insurance business under court supervision so that policyholders would be protected. Exhibit 1, 7 (Murphy Dec.) and Att. B thereto, p. 1732. Equitable control over ICI was acquired by the Republic of Ireland on March 15, 1985, when ownership of all shares of ICI was transferred from Allied to SAT, a new company created by the Republic of Ireland to hold the shares of ICI. The Irish Government agreed to fund the financial obligations for administration of ICI through the Irish Insurance Compensation Fund. Exhibit 1, ¶5 (Murphy Dec.) and Att. A thereto.

The Republic of Ireland's ownership of ICI is authorized in Irish law by the Insurance (Miscellaneous

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[13] Brendan Murphy has been the general manager of ICI (now ICAROM) since 1989 and is responsible for its day-to-day operations. He reports to the Administrator of ICAROM on matters relating to its day-to-day operations. The administrator and Mr. Murphy report to government officials on all significant matters.

Provisions) Act 1985, NO. 8 (1985) ("Insurance Act of 1985"), which was enacted shortly after the March 15, 1985, acquisition of ICI. This statute authorized the Minister for Industry, Trade, Commerce and Tourism to acquire ownership of ICI through SAT. There are two shares of SAT. Each share is held in trust for the Minister by a high-ranking civil servant who also serves as a director of SAT.[14] Exhibit 1, ¶10 (Murphy Dec.) and Att. D thereto, ¶11 and Att. B thereto, p. 1738.

SAT essentially is controlled by the Republic of Ireland's Minister for Enterprises and Employment.[15] The two civil servants who are SAT's directors and hold the shares of SAT are appointed by and may be removed by the Minister for Enterprise and Employment, after consultation with the Minister of Finance. Exhibit 1, ¶11 (Murphy Dec.) and Att. D thereto Insurance Act of 1985, §10(2)-(3). The directors hold their position on terms and conditions set by the Minister of Enterprise and Employment in consultation with the Minister of Finance. *Id.* at §10(4). The shareholders are obligated to pay any dividend received on account of the shares to the Minister for the benefit of the Exchequer. *Id.* at §12. In the event a director dies or retires, his share automatically vests in the Minister for Enterprise and Employment without the necessity for transfer. *Id.* at §12. Amendments to SAT's articles of

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[14] The shares of ICAROM are held by civil servants rather than the Minister because the Minister is a political official who holds his office for a limited period of time. Exhibit 1, ¶10 (Murphy Dec.).

[15] The Department of Industry, Trade, Commerce and Tourism changed its name to the Department for Enterprise and Employment in 1992. Exhibit 1, ¶9 (Murphy Dec.).

association may not be made unless the Minister for Enterprise and Employment approves them after consulting with the Minister of Finance. *Id.* at §7.

The declaration by Brendan Murphy further provides:

> On July 31, 1990, ICI changed its name to "ICAROM plc" and sold the name "ICI" and that part of ICI's business that relates to issuing to new policies to a French group of companies – AGF. This transaction did not alter the Republic of Ireland's ownership of ICAROM through SAT. SAT continues to own the shares of ICAROM and the two shares of SAT continue to be held in trust by two senior civil servants for the minister for enterprise and employment. The minister's statutory authority over the two civil servants remains the same. In addition, the Republic of Ireland continues to fund ICAROM through the Irish Insurance Compensation Fund to enable ICAROM to meet its financial obligations. The most recent infusion of funds took place in 1993-94 when approximately 52,000,000 Irish pounds (approximately $83,000,000.00 in U.S. dollars) was provided to ICAROM. The Republic of Ireland, through the Insurance Compensation Fund, has advanced a total of 227,000,000 Irish pounds (approximately $363,000,000.00 in U.S. dollars) over the past ten years in order to meet ICI's financial obligations. Attachment F, p. 18 (ICAROM Report and Financial Statement for 1994, April 11, 1995).,

Murphy Declaration at p. 12. Governmental responsibility over ICAROM as noted above continued through the filing of this action. *Id.*

Plaintiffs contend that the decision reached by the panel in *Texas Eastern* is not binding on the instant dispute because the following facts were not advanced or addressed in *Texas Eastern*:

1. The 1990 sale of assets by ICI and the concurrent creation of ICAROM . . . ;

2. The acknowledgment of the Irish Government that financial responsibility for ICAROM rests with Allied Irish Banks ("AIB"), a privately owned company, not with the government; and

3. The recognition of the temporary and limited nature of the Irish Government's involvement with ICAROM

Plaintiffs' Reply to Joint Opposition to Motion to Remand at p. 6. Plaintiffs contend that because the Irish government has never assumed ultimate financial responsibility for ICI's policy obligations and ICAROM's stock ultimately will revert to its original shareholder, Allied, ICAROM cannot establish the ownership requirement of §1603(b)(2). Plaintiffs also assert that the sale of ICI's name and that portion of the business pertaining to the underwriting of policies eviscerates ICAROM's foreign state status.

Plaintiffs' contention that the limited nature of the Republic of Ireland's administration of ICAROM was not addressed by the district court and considered by the panel in *Texas Eastern* is belied by the factors considered by the district court in support of its decision that subject-matter jurisdiction under the FSIA had been properly invoked. Judge VanArtsdalen specifically noted that although the administration of ICAROM was similar to a

Chapter 11 proceeding, the administrator nevertheless was cloaked with the powers of management and shareholder and accordingly was responsible for the continuing viability of ICAROM under the special laws transferring equitable control over ICAROM to high ranking governmental officials. In return for the Republic of Ireland's agreement to guarantee certain debts of ICI, the government was vested with all rights pertaining to the shares of SAT. This equitable ownership and control, although not permanent, was sufficient to invoke subject matter jurisdiction under the FSIA. Thus, plaintiffs' contention that the Republic of Ireland's limited ownership of ICAROM was not considered in *Texas Eastern* is without merit and it is clear that the form of ownership satisfies the requirement of §1603(a) & (b) in this jurisdiction. *See also Trump Taj Mahal v. Costruzoini Aeronautiche Giovanni*, 761 F.Supp. 1143, 1150 (D.N.J. 1991), *aff'd*, 958 F.2d 365 (3d Cir. 1992), *cert. denied*, 506 U.S. 826 (1992) (entity which was controlled by "state owned agency created to own, supervise and manage companies that are important to the [foreign state's] national interest" was foreign state within meaning of §1603(b)(2); *Balentine v. Union Mortgage Co.*, 795 F.Supp. 266, 269 (N.D.Ill. 1992) (foreign state's implementation of legal framework to gain equitable control over entity vested that entity with foreign state status under §1603(b)(2)).

This leaves for consideration plaintiff's [sic] contention that the sale of the underwriting division of ICAROM changed its foreign state status. The affidavit of Brendan Murphy noting that continuing administration of ICAROM as to the policies of insurance issued by ICI prior to 1985 is well documented and sufficiently demonstrates that the Republic of Ireland's administration of ICAROM

through SAT and its guarantee of ICI's pre-1985 debts were not changed by the 1990 sale. The instant action involves pre-1985 policies. Thus, ICAROM has the right to invoke subject matter jurisdiction under the FSIA based upon the Republic of Ireland's continuing ownership of ICAROM.[16]

Plaintiffs' argument that the service of suit clause works a waiver of ICAROM's §1441 rights likewise is unavailing. In the removed action in *Texas Eastern*, Texas Eastern argued that a service of suit clause in the policy constituted a waiver of ICI's right to removal. The district court rejected Texas Eastern's contention and held that "such a waiver must be express and unambiguous in the context of the FSIA." On appeal Texas Eastern relied upon *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207 (3d Cir. 1991), where the court concluded that a similar contractual provision constituted a waiver of the right to remove in the context of a diversity action which did not involve a foreign sovereign. In affirming the district court, two members of the panel opined that "given Congress' unusually strong preference for adjudication of claims against foreign states in the federal court system, . . . it would contravene strong public policy to permit less than an

[16] Plaintiffs also move for discovery in order to determine whether ICAROM qualifies as a foreign state within the meaning of §1603(b)(2). However, plaintiffs' arguments for discovery do not dispute the accuracy of any of the historical facts upon which this court has concluded that ICAROM is a foreign state under §1603(b)(2); instead, plaintiffs appear merely to be seeking the authority to embark on a fishing expedition which is certain to add cost and delay to this action and, in view of the bases for this court's aforesaid conclusion, far less likely to produce facts which will alter the court's ruling. Accordingly, the motion will be denied.

absolutely unequivocal contractual provision to divest a federal court of the FSIA subject matter jurisdiction." *Id.* at 1243. After noting that the clause could be construed as nothing more than a waiver of the right to consent *in personam* jurisdiction, which was less than unequivocal, the panel held that the standard had not been met and further reasoned that ICI was not a "foreign state" within the meaning of the FSIA at the time it subscribed to the policies and accordingly did not have the absolute right of removal under §1441(d) to waive at the time it subscribed.[17] Accordingly, the service of suit clause did not effect a waiver of ICI's absolute right to remove under §1441(d).

The same conclusion applies to the instant action. The service of suit clause referenced by plaintiffs is substantially similar to the clause advanced in *Texas Eastern*. *Compare Texas Eastern*, 15 F.3d at 1242 n.15 *with* Condition R ("Service of Suit Clause") at p. 12 of Exhibit A to plaintiffs' complaint. Accordingly, the condition is less than an absolutely unequivocal waiver and does not divest this court of subject matter jurisdiction.

It follows from the above analysis that there has been no collusive manufacturing of jurisdictional facts. It likewise is clear that there is a controversy between the third-party plaintiffs and ICAROM which is sufficient to satisfy the requirement that an action has been brought against a foreign state. ICAROM is not entitled to sovereign immunity on the third-party plaintiffs' claim

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[17] This result followed from the fact that the contractual provision was negotiated between private parties and the foreign sovereign could not have negotiated its original terms.

for contribution. *See* 28 U.S.C. §1605(a)(2). Accordingly, ICAROM properly has removed the action and subject matter jurisdiction exists over the entire case. *See Texas Eastern* 15 F.3d at 1241 ("Under [substantial controversy] standard, it would not defeat jurisdiction if there were no statutory basis for jurisdiction on the primary issue in the litigation, as long as the statutory elements of jurisdiction [are] present on any other 'substantial' issue."); *Trump Taj Mahal v. Construzioni Aeronautiche Giovanni Agusta*, 761 F.Supp. 1143 (D.N.J. 1991), *aff'd*, 958 F.2d 365 (3d Cir. 1992). No. 91-5295, slip op., (Feb. 12 1992), *cert. denied*, 506 U.S. 826 (1992) (legislative history of §1441(d) "demonstrates Congress' intent to allow pendent jurisdiction to the full extent the Constitution allows"); *Liberty Mutual Ins. Co. v. Insurance Corp. of Ireland*, 693 F.Supp. 340, 341-47 (W.D. Pa. 1988) (FSIA subject matter jurisdiction existed over entire coverage action even though only basis for it was contribution claim against ICI; by enacting the FSIA, "Congress created a single jurisdictional scheme conferring jurisdiction over the entire action if it includes a foreign state"); *In re Surinam Airways Holdings Co.*, 974 F.2d 1255, 1259-1260 (11th Cir. 1992) (writ of mandamus appropriate where district court had subject matter jurisdiction under the FSIA pursuant to third-party claims against foreign defendant but remanded main claims to state court; "if a foreign state lacks the ability to remove an entire action to federal court, then the goals of the [FSIA] will be frustrated when that foreign state is brought into an action as third-party defendant and is denied, for all practical purposes, the opportunity to fully litigate its liability in federal court"); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1409 (9th Cir. 1989) ("legislative history of §1441(d) shows that Congress intended to 'give sovereign foreign defendants an absolute right to a federal forum coupled with an unusually strong preference

for the consolidation of claims'"); 28 U.S.C. §1367(a). Because subject matter jurisdiction exists over the entire action, plaintiffs' motion to dismiss all counterclaims due to a lack of subject matter jurisdiction is meritless and must be denied.

For the reasons noted above, plaintiffs' motions to remand, dismiss and engage in discovery will be denied.

An appropriate order will follow.

/s/ Gustave Diamond
Gustave Diamond
United States District Judge

Date: March 29, 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

USX CORPORATION and BESSEMER AND LAKE ERIE RAILROAD COMPANY, Plaintiffs,	)	
v.	)	
ADRIATIC INSURANCE COMPANY, et al., Defendants,	)	Civil Action No. 95-866
v.	)	
ICAROM, Formerly known as INSURANCE CORPORATION OF IRELAND, Additional Defendant.	)	

ORDER OF COURT

AND NOW, this 29th day of March, 1996, for the reasons stated in the opinion filed this day, IT IS ORDERED that:

1) Plaintiffs' motion to remand (Document No. 64) be, and the same hereby is, denied;

2) Plaintiffs' motion to engage in discovery (Document No. 80) be, and the same hereby is, denied;

3) Plaintiffs' motion to dismiss all counterclaims for lack of subject matter jurisdiction (Document No. 76) be, and the same hereby is denied; and,

4) Plaintiffs' motion for oral argument (Document No. 96) be, and the same hereby is, denied as moot; and,

IT IS FURTHER ORDERED that:

1) Defendants' motion to postpone briefing scheduled on plaintiffs' motion to remand (Document No. 87) be, and the same hereby is, denied as moot;

2) The stay of further filings and proceedings entered on July 18, 1995, shall remain in effect until a case management conference is scheduled; and,

3) Counsel for ICAROM shall serve *forthwith* on all defense counsel of record a copy of this court's opinion and order and shall file a certificate of service with the Clerk of Court.

/s/ Gustave Diamond
Gustave Diamond
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

USX CORPORATION and BESSSEMER [sic] AND LAKE ERIE RAILROAD COMPANY,	)	
Plaintiffs,	)	Civil Action No. 95-866
v.	)	
ADRIATIC INSURANCE COMPANY, et al.,	)	
Defendants,	)	
v.	)	
ICAROM, Formerly known as INSURANCE CORPORATION OF IRELAND,	)	
Additional Defendant.	)	

OPINION

DIAMOND, District Judge.

Plaintiffs commenced this action seeking indemnification under approximately 278 umbrella and excess policies of insurance for financial losses in excess of $593,118,296.92, which plaintiffs incurred as a result of the settlement/satisfaction of nine civil suit judgements entered against Bessemer & Lake Erie Railroad Company ("B&LE") based upon its participation in a twenty-year conspiracy to violate federal and state antitrust laws. A case management order was entered on January 14, 1997, which divided this action into four phases, the first of which was designated "discovery and dispositive motions." Case Management Order of January 14, 1997 at I(D)(1) (Document No. 100). The

parties have completed all discovery pertaining to plaintiffs' claims that coverage is afforded under the policies and defendants' bases for denying those claims. Presently before the court are cross-motions for summary judgment. For the reasons set forth below, defendants' motion will be granted and plaintiffs' will be denied.

Summary Judgment

Fed.R.Civ.P. 56(c) provides that summary judgment may be granted if, drawing all inferences in favor of the non-moving party, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Summary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's claim, and upon which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. When the movant does not bear the burden of proof on the claim, the movant's initial burden may be met by demonstrating the lack of record evidence to support the opponent's claim. *National State Bank v. Federal Reserve Bank,* 979 F.2d 1579, 1582 (3d Cir. 1992). Once that burden has been met, the non-moving party must set forth "specific facts showing that there is a *genuine issue for trial,*" or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. *Matsushita Electric Industrial Corp. v. Zenith Radio Corp.,* 475 U.S. 574 (1986) (*quoting* Fed.R.Civ.P. 56(a), (e)) (emphasis in *Matsushita*). An issue

is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986).

In meeting its burden of proof, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). The non-moving party "must present affirmative evidence in order to defeat a properly supported motion" and cannot "simply reassert factually unsupported allegations." *Williams v. Borough of West Chester,* 891 F.2d 458, 460 (3d Cir. 1989). Nor can the opponent "merely rely upon conclusory allegations in [its] pleadings or in memoranda and briefs." *Harter v. GAF Corp.,* 967 F.2d 846 (3d Cir. 1992). Likewise, mere conjecture or speculation by the party resisting summary judgment will not provide a basis upon which to deny the motion. *Robertson v. Allied Signal, Inc.,* 914 F.2d 360, 382-83 n.12 (3d Cir. 1990). If the non-moving party's evidence merely is colorable or lacks sufficient probative force summary judgment must be granted. *Anderson,* 477 U.S. at 249-50; *see also Big Apple BMW, Inc. v. BMW of North America,* 974 F.2d 1358, 1362 (3d Cir. 1992), *cert. denied,* 113 S.Ct. 1262 (1993) (although court is not permitted to weigh facts or competing inferences, it is no longer required to "turn a blind eye" to the weight of the evidence).

General Background

Plaintiffs seek damages for breach of contract from each named defendant under the respective policies, subject to the monetary limits of those policies, together with pre-judgment and post-judgment interest. The

alleged breach is defendants' failure to indemnify plaintiffs for the liability arising from underlying third-party actions. The third-party actions followed the indictment of B&LE for a criminal violation of the Sherman Act and its subsequent conviction of the charged crime.

On October 13, 1981, a federal grand jury indicted B&LE and other railroads for criminal conspiracy in violation of §1 of the Sherman Act, 15 U.S.C. §1. On August 31, 1992, B&LE entered a plea of *nolo contendere* to the offense of conspiracy in restraint of trade as charged in the indictment. B&LE voluntarily entered the plea knowing it constituted a plea of guilt to the charges in the indictment and would result in a judgment of guilt as a matter of law. Transcript of July 26, 1982, Acceptance of *nolo contendere* Pleas in *United States of America v. Bessemer & Lake Erie Railroad, Inc., et al.*, Criminal No. 81-396, United States District Court for the District of Columbia, at pp. 23-28, set forth in Volume I of Appendix to Defendants' Motion for Summary Judgment ("Defendants' Appendix") at pp. 82-87. The entry of the plea admitted every essential element of the offense. *United States v. Bessemer & Lake Erie Railroad Co.*, 717 F.2d 593, 597 (D.C.Cir. 1983). It likewise barred any subsequent attack of the indictment on the merits and constituted an admission of the truth of all material factual allegations therein. *Id.* at 597 & 599. The indictment charged a multi-faceted conspiracy to eliminate potential competition in the transportation of iron ore which was mined in Minnesota, Wisconsin and Canada, shipped across the Great Lakes and transported by the railroads from docks on the southern shore of Lake Erie to inland steel mills in Western Pennsylvania, West Virginia, Ohio and Kentucky. *Id.* at 594-95.

Between 1982 and 1984, five steel companies, three dock companies and five trucking companies filed civil actions against ten railroads involved in the conspiracy, including B&LE, in federal district courts in Pennsylvania, Ohio, New York and the District of Columbia.[1] On April 17, 1984, the Judicial Panel on Multi-District Litigation consolidated the ten actions for pretrial proceedings at "MDL No. 587" (captioned *In Re Lower Lake Erie Iron Ore Antitrust Litigation*), and assigned the proceeding to the Honorable John P. Fullam of the United States District Court for the Eastern District of Pennsylvania. In May of 1989, Judge Fullam ordered the consolidated cases be tried as a consolidated action. The trial was bifurcated. The liability phase was tried between May 9 and June 18, 1989, and the jury returned verdicts against B&LE in nine of the actions.[2] The damage phase was tried between June 26 and July 28, 1989, to a separate jury, and it awarded substantial damages in eight of the actions. Judgments were entered on June 17, 1989, totaling $4,457,652,953.00,

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[1] The steel companies were Republic Steel Corporation, Jones & Laughlin Steel, Inc. (which included Youngstown Sheet & Tube Company), National Steel Corporation, Wheeling-Pittsburgh Steel Corporation and Sharon Steel Corporation. The dock companies were Erie-Western Pennsylvania Port Authority, Codan Corporation, Toledo World Terminal, Inc. and David W. Reaney and Reaney Dock Company. The trucking companies were Wills Trucking, Inc., Tauro Bros. Trucking Company, C.D. Ambrosia Trucking Company, Dart Trucking Company and R. Weise Trucking. The nine other defendant railroads were the Chesapeake & Ohio Railway Company, the Baltimore & Ohio Railroad Company, CSX Corporation, the Pittsburgh & Lake Erie Railroad Company, Consolidated Rail Corporation, Norfolk & Western Railway Company, Norfolk Southern Corporation, Penn Central Transportation Company, and the Penn Central Corporation.

[2] All other defendants settled prior to or during trial.

exclusive of interest, costs and attorneys' fees.[3] On February 27, 1991, Judge Fullam entered an opinion and order denying all post-trial motions except for one aspect of B&LE's motion which challenged an item of damage claimed by one steel company. Final judgments were otherwise entered in accordance with the damage jury's verdicts. *See In re Lower Lake Erie Iron Ore Antitrust Litigation,* 759 F.Supp. 219 (E.D.Pa. 1991). Appeals and cross-appeals were taken. On May 27, 1993, the United States Court of Appeals for the Third Circuit substantially affirmed the district court. *See In re Lower Lake Erie Iron Ore Antitrust Litigation,* 998 F.2d 1144 (3d Cir. 1993). B&LE's petition for rehearing and suggestion for rehearing *en banc* were denied on July 26, 1993. *Id.* at 1185. The Supreme Court denied B&LE's petition for writ of certiorari on January 24, 1994, and plaintiffs thereafter satisfied or settled the MDL 587 judgments.

Plaintiff USX Corporation seeks indemnification under the insurance policies procured pursuant to its catastrophic liability insurance program for seven policy periods between May 12, 1977, and April 1, 1983.[4] The May 12, 1977, through June 1, 1978, program included 5 layers of insurance providing $130 million of coverage in excess of a $50 million self-insured retention. The June 1, 1978, through June 1, 1979, program included six layers

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[3] The judgments reflected the trebling of damages under the federal antitrust laws and the doubling of damages under the Ohio Valenteen Act, as adjusted by set-offs equivalent to the aggregate amount of each MDL 587 plaintiff's settlements with the other MDL 587 defendants.

[4] B&LE is a named insured in USX's policies.

providing $150 million of coverage in excess of a $50 million self-insured retention. The June 1, 1979, through December 1, 1979, program included four layers providing $150 million of coverage in excess of a $50 million self-insured retention. The December 1, 1979, through December 1, 1980, program included six layers providing $275 million of coverage in excess of a $25 million self-insured retention. The December 1, 1980, through December 1, 1981, program included seven layers providing $275 million of coverage in excess of a $25 million self-insured retention. The December 1, 1981, through April 1, 1982, program included seven layers providing $325 million of coverage in excess of a $25 million self-insured retention. The April 1, 1982, through April 1, 1983, program included six layers providing $325 million of coverage in excess of a $25 million self-insured retention. *See* Joint Statement of Uncontested Facts (Document No. 427) ("Joint Statement") at ¶20-26. Collectively, defendants are domestic and international insurers (or their predecessors, successors-in-interest or assumptive re-insureds, as appropriate) who issued or subscribed to the policies comprising the seven-year program.

USX employed a commercial insurance brokerage service as its agent to procure the insurance in its catastrophic liability program. Employees of the insurance brokerage service worked closely with employees of USX's risk management department to accommodate USX's insurance needs. The policy providing for the initial layer of coverage during the first year was obtained in the London insurance market. USX provided significant amounts of underwriting data to certain underwriters in that market. Shortly after obtaining the first year of

coverage, USX's insurance broker prepared a memorandum reviewing the liability insurance policy form. USX thereafter continued to obtain a substantial portion of its catastrophic liability program insurance in the London market.

In each of the seven periods, USX's insurance coverage begins with a first-layer policy that contains the terms of and conditions for coverage. Each layer above the first layer consists of policies which follow the form of the first-layer policy, subject to any special terms or conditions of the individual policy. The first-layer policies generally are designated as "umbrella" policies and are, in all material respects, based upon a standard insurance form known as "the 1971 London umbrella wording." This form was modeled after the 1966 standard form commonly used in the North American market. With the exception of some of the policies comprising the 1982-1983 policy period, the first-layer policies were issued by London Market Insurers, which are certain underwriters at Lloyds' London and certain other companies participating in the London insurance market ("the London Defendants").

In procuring the policies, USX sought to and did obtain the broadest casualty coverage available. The underlying self-insured retentions signified that the insurance was to provide coverage for catastrophic liability. The insurance policies include or incorporate by reference the following "Insuring Agreement:"

> COVERAGE –
>
> Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Assured for

> all sums which the Assured shall be obligated to pay by reason of liability: –
>
> (a) imposed upon the Assured by law, or (b) assumed under contract or agreement . . . ,
>
> for damages on account of: –
>
> (i) Personal Injuries
>
> (ii) Property Damage
>
> (iii) Advertising Liability,
>
> caused by or arising out of each occurrence happening anywhere in the world.

Joint Statement at ¶27.

The key terms of the Insuring Agreement are as follows. The term "Occurrence"

> shall mean an accident, or a happening, or an event, or a continuous or repeated exposure to conditions, which unexpectedly and unintentionally results in a personal injury, property damage or advertising liability during the policy period.

Joint Statement ¶28. The term "Personal Injuries"

> means bodily injury (including death at any time resulting therefrom), mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination, humiliation; also libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any advertising activities.

Joint Statement at ¶29. The term "Property Damage"

> shall mean loss of or direct damage to or destruction of tangible property (other than owned by the Named Assured).

Joint Statement at ¶30. The term "Advertising Liability" shall mean: –

> 1) Libel, slander or defamation;
>
> 2) Any infringement of copyright or of title or of slogan;
>
> 3) Piracy or unfair competition or idea misappropriation under an implied contract;
>
> 4) Any invasion of right of privacy;
>
> committed or alleged to have been committed in any advertisement, publicity article, broadcast or telecast and arising out of the Named Assured's advertising activities.

Joint Statement at ¶31. The term "Damages"

> includes damages for death and for care and loss of service resulting from personal injury and damages for loss of use of property resulting from property damage.

Joint Statement at ¶32.

Plaintiffs' complaint avers and their pending motion for partial summary judgment seeks to establish that the outcome of B&LE's underlying conspiratorial conduct constituted an occurrence under Pennsylvania law and the resulting liability reflects a covered form of damage/injury under each key term in the Insuring Agreement. Plaintiffs generally contend, *inter alia,* that the MDL 587 losses constitute (1) a form of economic discrimination within the

scope of "discrimination" as used in the term "personal injuries" because the conspirators refused to establish lower rates for less expensive and time-consuming service; (2) a form of "unfair competition" which was committed in and arose out of B&LE's "advertising activities" because the railroads' tariffs were used as a means of implementing the conspiratorial agreement; and (3) a form of "loss of use" of tangible property because the MDL 587 plaintiffs were deprived of the ability to use equipment and assets which would have been used to compete with the railroads. Plaintiffs further contend that proper notice was given or that the lack of notice did not cause prejudice to the defendants.[5] Plaintiffs further argue that the MDL 587

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[5] The policies provide:

> NOTICE OF OCCURRENCE –
>
> Whenever the Assured, in the person of the Chairman of the Insurance Committee of United States Steel, has information from which the Assured may reasonably conclude that an occurrence covered hereunder, involves injuries or damages which, in event that the Assured should be held liable, is likely to involve this policy, notice shall be sent as stated in Item 4 of the Declarations as soon as practicable, provided, however, that failure to give notice of any occurrence which at the time of its happening did not appear to involve this policy but which, at a later date, would appear to give rise to claims hereunder, shall not prejudice such claims.

Joint Statement at ¶33. Relatedly, the policies provide:

> ASSISTANCE AND CO-OPERATION –
>
> The Underwriters shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Assured, but Underwriters shall have the right and shall be given the opportunity to associate with the

(Continued on following page)

plaintiffs sustained a form of covered damage/injury during each policy period due to the non-linear, progressive nature of their injuries. Based on these general premises, plaintiffs argue that each defendant is obligated to indemnify USX for the losses arising from the MDL 587 judgments.

Defendants generally contend that B&LE was not held liable for causing any injury/damage covered by the policies and plaintiffs' attempts to recharacterize the actual liability determined by the MDL 587 juries is contrary to the undisputed facts and governing law.[6] Beyond plaintiffs' asserted failure to fit the underlying loss within the basic requirements of coverage, defendants contend that the antitrust liability, which was imposed for restraint of trade and attempted monopolization, epitomizes the essence of an intended and expected harm and a non-fortuitous loss, and any such loss is expressly precluded under the definition of an occurrence and is uninsurable as a matter of Pennsylvania public policy. Similarly, defendants assert that torturing the terms of the policies to permit recovery here would relieve plaintiffs of the financial consequences of B&LE's illegal conduct and allow a monopolist to retain the benefits derived from

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> Assured or the Assured's underlying insurers or both in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve Underwriters, in which event the Assured and Underwriters shall co-operate in all things in the defense of such claim, suit or proceeding.

Joint Statement at ¶34.

[6] All parties agree that Pennsylvania insurance law applies.

participating in an antitrust conspiracy, a proposition which would offend both state and federal public policy. Finally, defendants argue that because plaintiffs failed to give notice of the MDL 587 litigation until after the Third Circuit affirmed the judgments against B&LE, defendants suffered prejudice as a matter of law, thereby precluding coverage on this independent ground as well.

Overview of the MDL 587 Litigation[7]

The ten antitrust suits comprising the MDL 587 litigation each charged the railroads with entering into a conspiracy, formed in the mid-1950's, to restrain trade in and monopolize dock handling, storage and transportation costs of shipping iron ore inland from the shore of lower Lake Erie. The conspiratorial agreement was a response of the railroads to a technological innovation in transporting ore across the Great Lakes which began to develop prior to 1956.

Most of the ore used in making steel in the multi-state region served by lower Lake Erie originated in mines in Michigan, Minnesota and Eastern Canada. The ore was shipped across the Great Lakes and unloaded at docks in Pennsylvania and Ohio. For years the prevailing method

[7] The following summary is taken from Judge Fullam's opinion reported at *In re Lower Lake Erie Iron Ore Antitrust Litigation,* 759 F.Supp. 219 (E.D.Pa. 1991) and the Third Circuit's opinion at *In re Lower Lake Erie Iron Ore Antitrust Litigation,* 998 F.2d 1144 (3d Cir. 1993) (Mansmann, J.). Because "[t]he same conspiratorial conduct described in the criminal indictment [was] the subject of [the] civil antitrust suit," *id.* at 1162 n.7, a background summary similar to the summaries in these reported opinions is contained in *United States v. Bessemer & Lake Erie R., Co.,* 717 F.2d 593 (D.C. Cir. 1983).

of transportation involved the shipment of bulk quantities of the ore, which was in an unprocessed, mud-like form. Large transportation vessels known as "bulkers" transported virtually all the ore across the Great Lakes. The bulkers were unloaded by heavy cranes commonly known as "huletts." A hulett unloaded the ore from the hold of a bulker using a clamshell-like claw that dipped into the hold, scooped up a load of the mud-like substance and moved it to the dock where it was loaded directly onto railroad cars or stockpiled at onshore storage areas. The docks used in this process were owned by the railroads and equipped with huletts.

The rates for the various services at all of the railroad docks were identical and established pursuant to Interstate Commerce Commission ("ICC") approved tariffs which specifically were exempt from antitrust scrutiny under §5(a) of the Interstate Commerce Act ("ICA"), as amended by the Reed-Bullwinkle Act of 1948, 49 U.S.C. §10701(a) (1949). Pursuant to that amendment, the ICC approved an agreement of the Eastern Railroads which established the Rate Bureau (the Coal, Coke and Iron Ore Committee). B&LE was a member of the Rate Bureau. All railroad action taken pursuant to that agreement was given §5(a) immunity and conclusively presumed to represent reasonable rates and charges. *Id.* at 223-24. Private (*i.e.,* non-railroad) docks at the lower Lake Erie ports were not equipped with huletts and were unable to compete for ore traffic, which in turn gave the railroads a lawful monopoly over the unloading and land transportation of ore.

In the early 1950s a new technology developed which enabled ore producers to process the ore into high-grade marble-sized pellets. The formation of ore into pellets

permitted shipment of the ore in self-unloading vessels. These vessels were able to unload their cargo with an internally mounted conveyor belt. Following the enlargement of a particular lock on the Great Lakes, self-unloaders were able to carry substantially larger loads of ore than bulkers, were able to unload in less time and with a smaller crew and did not require any special equipment. The use of self-unloaders created the potential for non-railroad docks to compete as unloading sites and these docks potentially were able to store and ship ore at lower costs than railroad docks because the land-based unloading equipment and large work crews were not needed. Thus, self-unloaders and non-railroad docks could be used to compete directly with the railroads and this development also made possible the use of trucks as an alternative means of transporting the ore inland.

For years the railroads had controlled access to the unloading docks and provided inland rail transportation of the ore. The self-unloader/non-railroad dock system threatened to compromise the railroads' monopoly over inland transportation. The ability to use private docks created the option of hauling the ore by rail or truck to the inland steel companies, and this competition had the potential to produce significant saving to the steel companies. The MDL 587 plaintiffs' central contention was that the railroads, perceiving the significant threat from the self-unloaders/non-railroad docks/trucking system, entered into an agreement designed to thwart the progress of the self-unloader technology in order to maintain their dominance in the market and protect their substantial investments in lake shore property and conventional unloading equipment.

As early as 1956 high-ranking railroad officials convened and forged a planned course of action designed to circumvent the development of self-unloaders. The implementation of this agreement was accomplished by three separate means. Railroad officials orally agreed that leases of railroad docks or facilities were to be examined and modified to frustrate the efforts of non-railroad docks to handle ore from self-unloaders. The railroads thus either refused to sell or lease any property that could be used to establish a private dock or began to sell or lease property with express restrictions against such use. The railroads further agreed to keep dock-handling and shipment rates for self-unloaders artificially high at railroad-owned docks and refused to recognize a discount rate for ore transported on self-unloaders, despite the reduced costs in providing such services. Finally, the railroads agreed among themselves to refuse to publish different (competitively priced) commodity line haul rates for hauling ore from private docks.

The railroads converted their agreement into action to effectuate the goal of market preclusion. They used coercion to enforce adherence to the facets of the agreement and succeeded in restricting the lease and sale of railroad-owned dock property and boycotting non-railroad docks. These activities diminished the economic incentives to use self-unloaders and by impeding the development of a private dock system, the railroads succeeded in precluding direct competition from the trucking industry.

The MDL 587 plaintiffs sued under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2), Section 4 of the Clayton Act (15 U.S.C. §15) and the Ohio Valentine Act, Ohio Rev'd Code §§1331.01-1331.99. In addition to other forms of injury, the steel company plaintiffs sought

damages for lost savings which would have been realized had the railroads' anti-competitive behavior not retarded the development and implementation of the self-unloader technology. The steel companies identified five compensable forms of injury: (1) savings from lower dock handling rates from private commercial docks, (2) savings from railroad docks that would have been realized from the competition of private docks, (3) lower trucking rates for actual shipment, (4) savings from market-sensitive commodity line haul rates, and (5) inherent savings from the option to choose the most efficient and economical combination of transportation alternatives. The dock companies sought to recover the profits they would have realized had they been able to establish themselves in the market. The trucking companies likewise sought similar damages on the theory that had they not been precluded from entering the market, they would have established themselves and realized significant profits.

B&LE sought to preclude or limit the recovery of damages based upon (1) its (and the other railroads') entitlement to immunity under the ICA and the doctrine in *Keogh v. Chicago & Northwestern Ry. Co.,* 260 U.S. 156 (1922) and (2) the antitrust standing principles established in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). In *Keogh,* the Supreme Court held that private litigants cannot recover damages under the antitrust laws where the damages are based upon rates and charges approved by the ICC. Having established such rates and charges in accordance with the ICA, such rates presumptively are legal and a private litigant is precluded from attempting to prove that hypothetical lower rates would have been charged in the absence of asserted antitrust conduct and the acceptance of the established rates by the ICC.

Through the Reed-Bullwinkle Act of 1948, Congress extended the railroads' immunity to engaging in collective rate-setting activity. Thereafter, any railroad action undertaken pursuant to the rate bureau established by the authorized agreement of Eastern Railroads was immune from antitrust scrutiny.[8] The MDL 587 juries were instructed fully on all immunity issues. The liability jury determined that B&LE had violated the antitrust laws through forms of conduct which were not immune.[9] The damages jury calculated its awards based upon the railroads' non-immune conduct.[10] The Third Circuit ultimately

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[8] Although the participating railroads were permitted to establish rates, charges, divisions and proposed tariffs to be filed with the ICC under the rate-bureau mechanism, in order to maintain ICA immunity each railroad had to remain free to propose its own tariffs and any agreement which attempted to curtail the freedom of independent action transcended the immunity and could give rise to antitrust liability. Similarly, combinations and agreements on matters other than tariff proposals which were established outside the rate-bureau mechanism likewise could be found to violate the antitrust laws.

[9] The MDL 587 plaintiffs presented to the liability jury evidence of the railroads' (1) agreement to restrict the sale and lease of lake shore property which could be used for private docks, (2) refusal to handle self-unloaders in a way that would make economic sense for the steel companies to utilize them and (3) collective coercive action aimed at preventing independent action by each carrier.

[10] Throughout the litigation B&LE contended that the damages sought (and ultimately recovered) were based upon price-fixing that had been approved by the ICC. The district court relied on *Keogh* to dismiss all claims for damages based upon the actual rates charged by the railroads. This left for consideration the steel companies' claims that had the railroads not retarded the development of the self-unloader industry they would have paid (1) lower dock-handling rates to the private docks (as compared to the rates they actually paid to the railroad docks), (2) lower lake transportation costs and (3) lower land transportation costs by utilizing the trucking industry (had the railroads not restrained competition and monopolized line hauling from

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concluded "that the district court correctly characterized B&LE's anti-competitive activity as market preclusion, and *Keogh*'s protective rule [could not be applied] to forbid recovery for the resulting economic detriment." 998 F.2d at 1159.

The MDL 587 plaintiffs successfully demonstrated that the railroads conspired to protect their control over the ore transportation market and effectively retarded the entry of lower-cost competitors into that market. It was the railroads' collective hindering of the development of the lower-cost market which defined the MDL 587 litigation. The railroads' concerted action was found to have thwarted competition by precluding the steel companies from utilizing alternative, lower-cost private docks, which in turn diminished the steel companies' economic incentives to develop self-loaders.[11] The natural consequences of

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railroad-owned docks). The steel companies were awarded damages in one or more of the following categories: inflated dock-handling charges; damages flowing from inflated lake transportation costs; additional "demurrage" costs (the amount assessed while equipment stands idle); and increased investment costs in the subsequent development and acquisition of self-unloading vessels. Judge Fullam reasoned that these damages directly resulted from the elimination of competition and were independent of the rates approved by the ICC.

[11] The steel companies claimed that they would have purchased or leased their own self-loader vessels. In addition, National Steel owned and operated its own fleet of transportation vessels, one of which was the *Stinson*. National Steel claimed it would have built the *Stinson* earlier and at a lower cost. Damages ultimately were awarded to National Steel for this claim and although Judge Fullam set these damages aside on the theory that the impact of inflation was offset by the time-value of money, the Third Circuit reversed that ruling and reinstated the damages due to B&LE's failure to challenge that award in its motion for directed verdict.

these activities compelled the steel companies to continue to pay the rates lawfully established by the railroads. And, while the measure of damages began with the ICC-approved tariffs, the non-immune anti-competitive market preclusion orchestrated by the railroads distinguished the steel companies' damage awards from those based on concerted rate-making activities protected by *Keogh*. Because the juries were instructed fully on the scope of the *Keogh* doctrine and found both the offensive conduct and the resulting damages to be beyond its scope, the steel companies' damages were not based on activities undertaken to establish tariff rates approved by the ICC.[12]

B&LE also argued that the MDL 587 damage claims were precluded by the indirect purchaser doctrine established in *Illinois Brick,* as interpreted in *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979). *Illinois Brick* was a price-fixing case where the Supreme Court held that only the original purchaser who initially paid the inflated price could maintain an antitrust action. In *Mid-West Paper,* the Third Circuit applied the doctrine and held that only purchasers from a price-fixing conspirator sustained an antitrust injury and purchasers from non-conspiring competitors of the conspirators could not recover, even though the conspiracy may have enabled the independent competitor to charge higher prices due to an inflated market. Judge Fullam

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[12] The *Keogh* doctrine was not applicable to the dock and trucking companies' claims because the doctrine is limited to claims of consumers. The dock and trucking companies sought to be direct competitors with the railroads and did not advance claims as consumers of their services.

reasoned that the indirect purchaser doctrine did not bar recovery of the steel companies' material-handling awards or the dock and trucking companies' recoveries. He similarly reasoned that the inflated dock-handling charges were incurred by the steel companies as customers of the railroads and thus as direct purchasers. The inflated lake transportation charges, although less clear, also survived an *Illinois Brick* challenge because of the steel companies' history of direct involvement in the ownership and control of ore transportation vessels.[13]

The Third Circuit upheld the steel companies' damage awards against B&LE's *Illinois Brick* challenge under a more complex and differently focused inquiry. It considered each component of the recovered damages to determine whether the injury had a causal relation to the antitrust violation, focusing on and balancing the consideration of (1) the causal connection between the violation and the harm and the intent of B&LE to cause that harm, (2) whether the injury was intended to be redressed by the antitrust laws, (3) the directness of the injury, (4) the existence of other direct victims and (5) the potential for duplicative recoveries or the recovery of damages which would require a complex apportionment analysis. The court reasoned that the steel companies' lake transport savings awards were recoverable because the conspiracy

[13] Through long-term leases and other contractual arrangements, the steel companies had assumed responsibility for financing and operating ore-carrying vessels. It thus was reasonable for the juries to conclude that absent the conspiracy, the steel companies would have become similarly involved with self-unloaders and would have achieved direct cost reductions. On this basis Judge Fullam upheld the lake transportation savings awards to the steel companies.

took the form of and sought to effectuate a market exclusion, the transportation industry existed exclusively for the steel companies, the direct nature of the injury established a sufficient causal connection to the conspiracy, the injury was a type intended to be redressed by the antitrust laws and, while there were other direct victims and the potential for duplicative recoveries and complex apportionment problems, this component of the steel companies' damages was measured by the difference between the amounts they actually paid to transport the ore and the lower prices they would have paid had the conspiracy not blocked implementation of the lower-cost system. Ascertaining this difference did not require undue speculation. It likewise upheld the steel companies' recoveries for inflated dock handling charges against B&LE's challenge of indirect injury, reasoning that although the dock companies were another direct victim of the conspiracy, the steel companies were awarded damages for the inability to utilize private docks and thus the damages arose from the conspiracy's elimination of competition from those docks, not from the charges which might have been paid to the private docks. It similarly upheld the awards to the trucking companies, reasoning that the conspiratorial actions clearly were intended to inhibit competition by the trucking companies, a restraint against market entry precisely was the type of injury the antitrust laws were designed to prevent, and any difficulty in measuring damages was brought about by the railroads' conduct.

Overview of the Applicable Law

At the core of the parties' dispute are disagreements concerning the meaning and scope of the key terms in the Insuring Agreement. The interpretation of an insurance

policy is a question of law for the court. *Reliance Insurance Co. v. Moessner,* 121 F.3d 895, 900 (3d Cir. 1997); *Standard Venetian Blind Co. v. American Empire Insurance Co.,* 469 A.2d 563, 566 (Pa. 1983). Construing an insurance policy requires the court to ascertain the intent of the parties as manifest by the language used in the written agreement. *Riccio v. American Republic Ins. Co.,* 705 A.2d 422, 426 (Pa. 1997). The policy is to be read as a whole and the intent of the parties is to be ascertained from the entire instrument. *Riccio,* 705 A.2d at 426 (*citing Smith v. Cassida,* 169 A.2d 539, 541 (Pa. 1961)). "When the policy language is clear and unambiguous, the court must give effect to the language in the contract." *Id.; The Medical Protective Co. v. Watkins,* 198 F.2d 100, 103 (3d Cir. 1999) (*citing Standard Venetian Blind Co.,* 469 A.2d at 566)). Where, however, the policy is ambiguous, the clause giving rise to the ambiguity must be construed in favor of the insured. *The Medical Protective Co.,* 198 F.2d at 103; *Reliance Ins. Co.,* 121 F.3d at 900-01; *Riccio,* 705 A.2d at 426; *Standard Venetian Blind,* 469 A.2d at 566. In ascertaining the intent of the parties the court is to interpret the policy with an eye toward avoiding ambiguities and giving effect to all of the provisions in the policy. *The Medical Protective Co.,* 198 F.3d at 103 (*citing Little v. MGIC Indemnity Corp.,* 836 F.2d 789, 793 (3d Cir. 1987)); *Contrans, Inc. v. Ryder Truck Rental, Inc.,* 836 F.2d 163, 169 (3d Cir. 1987) (a policy is to be interpreted in a manner which gives meaning to all of its terms when read as an entirety and phrases are not to be considered in isolation but by a reading in harmony with the rest of the contract).

Ambiguities generally take two forms: patent and latent. *Sunbeam Corp. v. Liberty Mutual Ins. Co.,* 740 A.2d

1179, 1185 (Pa.Super. 1999). Patent ambiguities appear on the face of the contract from the use of defective, obscure or insensible language. *Id.* (*citing Z & L Lumber Co. v. Nordquist,* 502 A.2d 697, 700 (Pa.Super. 1985)). A latent ambiguity arises from extraneous or collateral facts that render the meaning of contract language uncertain even though in a general sense the language appears clear and unambiguous as written. *Id.*

In ascertaining whether a term of the policy is ambiguous, the issue is whether the questioned term or phrase as examined in the context of the entire policy is "reasonably susceptible of different constructions and capable of being understood in more than one sense." *The Medical Protective Co.,* 198 F.3d at 103 (*quoting Reliance Ins. Co.,* 121 F.3d at 900). A term or phrase is ambiguous if "reasonably intelligent" people "on considering it in the context of the entire policy would honestly differ as to its meaning." *Northbrook Ins. Co. v. Kuljian Corp.,* 690 F.2d 368, 372 (3d Cir. 1982).

Determining whether specific policy language is susceptible of different reasonable constructions is not to be done in a vacuum. *Madison Construction Co. v. Harleysville Mutual Ins. Co.,* 735 A.2d 100, 106 (Pa. 1999). Instead, "contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts." In performing the inquiry the court is not permitted to distort the meaning of the language or employ a strained contrivance in order to create an ambiguity. *Id.* (*citing Steuart v. McChesney,* 444 A.2d 659, 663 (Pa. 1982)); *Northbrook Ins. Co.,* 690 F.2d at 372 (a court may not twist the language or rewrite the policy to create doubts where none exist); *McNally v. Republic Ins. Co.,* 718 A.2d 301, 303 (Pa.Super. 1998) ("we

will not torture the clear and unambiguous language of [a] policy so as to create [an obligation] that does not otherwise exist"). Words of common usage in an insurance policy are to be given their natural, plain and ordinary meaning. *Riccio,* 705 A.2d at 425 (*citing Easton v. Washington County Ins. Co.,* 137 A.2d 332, 335 (Pa. 1957)); *Madison Construction Co.,* 735 A.2d at 108. These principles preclude a finding of ambiguity based on the contention that a particular term is so broad that it virtually has no limit in its application. *Madison Construction Co.,* 735 A.2d at 107. Instead, the inquiry must be "guided by the principle that ambiguity (or the lack thereof) is to be determined by reference to a particular set of facts" and thus the court is to focus only on the factual scenario at hand. *Id.* Throughout the undertaking the language employed by the parties is the "polestar" of the inquiry. *Id.* at 106; *see also Selko v. Home Ins. Co.,* 139 F.2d 146, 151 (3d Cir. 1998) (language of policy remains primary consideration and it is to be construed according to its plain and ordinary meaning) (citations omitted).

"[T]he parties' reasonable expectations are to be the touchstone of any inquiry into the meaning of an insurance policy." *Bensalem Township v. International Surplus Lines, Ins. Co.,* 38 F.3d 1303, 1309 (3d Cir. 1994). Although the language of the policy normally provides the best indication of the parties' reasonable expectations in forming the contract, the totality of the insurance transaction must be examined to ascertain the reasonable expectations of the insured. *Reliance Ins. Co.,* 121 F.3d at 903. In ascertaining the intent of the parties, consideration must be given to any reasonable expectation the insurer created in the insured during the negotiation process. *The Medical Protective Co.,* 198 F.3d at 106. As a result even

the most clear and unambiguous provisions of a policy will not bind an insured where an insurer improperly has created a reasonable expectation in the insured that coverage will exist for a particular type of loss. *The Medical Protective Co.,* 198 F.3d at 106-07.[14] Absent sufficient justification, however, "an insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous." *Frain v. Keystone Ins. Co.,* 640 A.2d 1352, 1354 (Pa.Super. 1994).

A substantial aspect of the parties' dispute also concerns the appropriate scope of review in evaluating the liability arising from the MDL 587 litigation. Plaintiffs contend that the entire underlying course of conduct for which coverage is sought must be examined to determine whether any facts therein create a scenario which would trigger the defendants' contractual obligations. Plaintiffs specifically argue that it is the facts alleged in the underlying complaint which establish whether a policy's coverage is triggered and it is the construction of those facts which controls rather than the formal theory of liability or label placed on the advanced cause of action. At various times plaintiffs argue that this court's review includes an assessment of the testimony and evidence submitted by B&LE in the MDL 587 litigation and whether any aspect of the entire course of conduct conceivably could fall within the scope of the Insuring Agreement. Defendants contend,

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[14] The Supreme Court of Pennsylvania has only applied this aspect of the doctrine "in very limited circumstances" to protect non-commercial insureds from policy terms not readily apparent and insurer deception. *Madison Construction Co.,* 735 A.2d at 109 n.8.

that the duty to indemnify necessarily is measured by the material facts actually established in the MDL 587 trial and this court need look no further than the jury instructions given and special interrogatories rendered therein to determine unequivocally that the losses are not covered.

The insuring agreement creates a contract of indemnification. Plaintiffs' proposed scope of review confuses the standards used to determine whether a contingent duty to indemnify is created by an underlying complaint (thus triggering the duty to defend in a standard liability policy containing such a duty) and those employed to determine whether there is an actual duty to indemnify.

It is a well-accepted principle that an insurer's duty to defend is "conceptually distinct from and legally independent of its duty to indemnify, that is, its obligation to pay a judgment." *Sherman v. Ambassador Ins. Co.,* 670 F.2d 251, 258-59 (D.C. Cir. 1981); *C.H. Heist Caribe Corp. v. American Home Assur.,* 640 F.2d 479, 483 (3d Cir. 1981) (emphasizing distinction between duties to defend and indemnify and recognizing that duty to defend necessarily is a broader duty). "It follows that there may be a duty to defend without a duty to indemnify." *The Frog, Switch & Manufacturing Co., Inc. v. The Travelers Ins. Co.,* 193 F.3d 742, 746 (3d Cir. 1999).

The cases are legion which hold that where a liability policy contains an obligation to defend, that obligation is triggered if the underlying complaint avers any facts that potentially could support a recovery under the policy, and once that obligation is triggered, the insurer has a duty to defend until the claim is confined to a recovery that the policy does not cover. *See, e.g., General Accident Ins. Co. of*

America v. Allen, 962 A.2d 1089, 1095 (Pa. 1997); *The Frog, Switch and Manufacturing Co.,* 193 F.3d at 746. The duty to defend thus carries with it a conditional obligation to indemnify in the event the insured is held liable for a covered claim. *Id.* The duty to defend and the contingent duty to indemnify both flow from a determination that the underlying complaint triggers coverage; this determination is not based solely on the particular cause of action pleaded, but "[i]nstead it is necessary to look at the factual allegations contained in the complaint." *Mutual Benefit Ins. Co. v. Haver,* 725 A.2d 743, 745 (Pa. 1999); *C.H. Heist Caribe Corp.,* 640 F.2d at 483 (the factual allegations of complaint must be reviewed to determine whether terms of policy potentially apply). The averments of the underlying complaint must be "liberally construed with all doubts as to whether the claims may fall within the policy coverage to be resolved in favor of the insured." *Roman Mosaic & Tile Co. v. Aetna Cas. & Sur. Co.,* 704 A.2d 665, 669 (Pa. Super. 1997) (*citing Cadwallader v. New Amsterdam Cas. Co.,* 152 A.2d 484 (Pa. 1959); *The Frog, Switch and Manufacturing Co.,* 193 F.3d at 746).

In contrast, the actual duty to indemnify stands on separate footing. An insurer is required to indemnify only where the insured is held liable for a claim actually covered by the policy. *Allen,* 692 A.2d at 1095 (*citing Pacific Indemnity Co. v. Linn,* 766 F.2d 754 (3d Cir. 1985)); *see also Winner International Corp. v. Continental Casualty Co.,* 889 F.Supp. 908, 916 (W.D.Pa. 1994) ("While an insurer must defend its insured if the complaint alleges conduct that potentially falls within the scope of the policy, it must indemnify its insured only if liability is found for conduct that actually falls within the scope of the policy.") (*citing Allstate Ins. Co. v. Brown,* 834 F.Supp. 854, 857

(E.D.Pa. 1993) (there is no duty to indemnify "if the conduct for which the insured is found liable does not come within the scope of the policy") (*citing Air Products & Chemicals v. Hartford Accident & Indemnity Co.*, 707 F.Supp. 762, 776 (E.D.Pa. 1989)). Thus, the duty to indemnify does not arise until the liability imposed against the insured is conclusively established. *C.H. Heist Caribe Corp.*, 640 F.2d at 483; *Enron Oil Trading & Transportation Co. v. Underwriters of Lloyd's of London*, 47 F.Supp.2d 1152, 1161 (D.Mont. 1996) (actual indemnification is dependent upon whether the insured is found liable for a covered claim). Where the underlying action has been resolved by a jury, the insurer's duty to indemnify is determined by the material facts established at trial. *Enron Oil*, 47 F.Supp.2d at 1161 (*citing American Motorists Insurance Co. v. General Host Corp.*, 946 F.2d 1482, 1488 (10th Cir. 1991)).

Where an insured seeks indemnification for underlying liability established by a judgment, the precepts of finality and estoppel are brought into play. The doctrine of *res judicata* binds parties and their privies to an action in which a judgment was rendered. *Clinchfield Railroad Co. v. United States Fidelity & Guaranty Co.*, 160 F.Supp. 337, 340 (E.D.Tenn. 1958). Where a party has had a full and fair opportunity to litigate a particular issue, he is not, ordinarily, entitled to relitigate the matter. *Id.* (*citing in support* 50 C.J.S. Judgments §763 (party judicially is estopped to relitigate issues in suit to which he was a party)). Thus, in actions between indemnitors and indemnitees, the indemnitee is subject to the burdens, as well as the benefits, of the rules of *res judicata* with regard to matters determined in the third-party action and is estopped from showing that the prior judgment was based

upon an incorrect finding of fact. *Id.* at 340-41 (*citing, inter alia,* Restatement of Law, Judgments, §107(h) and *Crawford v. Pope & Talbot, Inc.,* 206 F.2d 784, 795 (3d Cir. 1953); *Fidelity & Casualty Co. of New York v. Federal Express,* 136 F.2d 35, 39 (6th Cir. 1943)). These well-settled principles extend to specific judicial determinations and conclusions about the legal import of the material facts, even though "the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Department Stores v. Moitie,* 452 U.S. 394, 398-99 (1981) (*citing Baltimore S.S. Co. v. Phillips,* 274 U.S. 316 (1927) (erroneous conclusion reached by appellate court is not subject to collateral attack) and *Reed v. Allen,* 286 U.S. 191 (1932) (emphasizing "conclusive character of judgments")).

Pennsylvania law recognizes the specific application of the rules pertaining to the finality of judgments in the context of insurance coverage disputes and the Pennsylvania Supreme Court long ago recognized that "a judgment recovered against an insured by an injured party is conclusive on the issues there determined in a subsequent proceeding by the injured party or by the insured against the insurance carrier for indemnity." *Renschler v. Pizano et al. (State Automobile Ins. Ass'n., Intervenor),* 198 A. 33, 35 (Pa. 1938). On this score "there is complete unanimity among the authorities in declaring that the plaintiff, in an action to recover indemnity, is bound by all findings and conclusions without which the judgment could not have been rendered." *Builders Supply Co. v. McCabe,* 77 A.2d 368, 372 (Pa. 1951). It has been recognized in Pennsylvania for more than 150 years that in such circumstances an insured is not at liberty "to prove that the recovery [against him] was wrong." *Id.* (*quoting Weckerly v. Minis-*

ters, etc., Lutheran Congregation, 3 Rawle 172, 180 (Pa. 1831) (Justice Kennedy)). The rationale for these principles

> is plain enough. In such a case the indemnitee himself relies on the judgment against him in the earlier action as a basis of his right of recovery over, and with the judgment he must take for better or worse the adjudicated facts on which the judgment rests.

Id. at 373.

A recent application of these principles is found in *Unigard Security Insurance Co. v. Murphy Oil USA, Inc.,* 962 S.W.2d 735 (Ark. 1998). There, the insured, Murphy Oil USA, Inc., filed suit against a number of carriers seeking coverage under various comprehensive general liability policies for a judgment awarding compensatory and punitive damages. Murphy Oil leased an island in the Mobil [sic] River in Alabama and operated a petroleum-storage facility on the island. During the 24-year lease Murphy Oil's operations resulted in routine spills of petroleum products during cleaning and maintenance of the storage tanks and loading the petroleum into transport vehicles. In addition, three major spills occurred in 1970, 1975 and 1982. *Id.* at 736. These spills were caused by over-estimations of the capacity of the tanks into which the petroleum products were being pumped. *Id.* at 737.

Murphy Oil returned possession of the island to the lessor in 1985 and did not test for possible contamination or engage in any clean-up efforts. Four years later, the lessor learned of the contamination and notified Murphy Oil, which refused to assist in the clean-up. The lessor

commenced an action in 1990 seeking compensatory and punitive damages under the theories of negligence, breach of lease and trespass. The negligence claim alleged that Murphy Oil had failed to use reasonable care in preventing the release of the petroleum products and was negligent in its use, operation and/or occupancy of the premises. The breach-of-lease claim alleged that Murphy Oil breached the lease by failing to surrender the premises in the same condition it was in at the commencement of the lease, based on a provision in the lease which required Murphy Oil to "quit and surrender the premises hereby demised in as good state and condition as reasonable usage thereof will permit." *Id.* The trespass claim alleged Murphy Oil had interfered with the lessor's rights in the property and the trespass had been accomplished by malice, fraud or oppression. The negligence action was dismissed as barred by the statute of limitations and the breach of contract and trespass claims were submitted to a jury.

The jury found Murphy Oil had breached its lease, which in turn caused the contamination of the island, and awarded $3.4 million in compensatory damages. The jury further found that Murphy Oil had committed a trespass and although it did not award compensatory damages for the trespass, it did award $4.6 million in punitive damages upon a finding that the trespass had been accompanied by malice, fraud or oppression.

Murphy Oil sought indemnification under various policies which obligated the insurers "to indemnify the Assured for all sums the Assured shall be obligated to pay by reason of liability imposed upon the Assured by law . . . for damages . . . on the account of . . . property damage. . . ." *Id.* at 739. The Supreme Court of Arkansas refused to

construe the breach of contract liability as a legal obligation to pay damages "on the account of" property damage. It explained:

> The coverage question thus turns on the nature or type of liability that Murphy Oil incurred in the underlying Alabama suit. If the underlying liability was for damages imposed "on account of" or "because of" accidentally caused "property damage," then there is potential coverage under the policies. If the underlying liability was for damages imposed for some other reason, then there is no potential coverage.
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> It is obvious to us that the Alabama jury, considering the instructions it received from the District Court and its answers to the interrogatories, made the award for compensatory damages "on account of" or "because of" Murphy Oil's breach of its lease, not on account of any property damage that resulted in Murphy Oil's operations on the island. The basis of Murphy Oil's liability for compensatory damages was simply its failure to honor its covenant to "quit and surrender the premises hereby demised in as good state and condition as reasonable usage thereof will permit." Murphy Oil's liability for compensatory damages, therefore, did not arise from conduct on the part of Murphy Oil that injured or damaged any property. The case would arguably be different, of course, had the jury based its award of compensatory damages on the negligence claim originally brought by the [Lessor]. As mentioned, however, that claim was

> dismissed under the statute of limitations and never reached the jury.

Murphy Oil, 962 S.W.2d at 740. Thus, it is the actual basis for liability in the underlying action which determines whether there is a duty to indemnify, not whether the underlying course of conduct involved historical facts which could be marshaled to support a covered claim.

As explained below, an application of the above principles demonstrates that the MDL 587 loss is not within the scope of the Insuring Agreement.

Analysis

A. Property Damage

Plaintiffs assert the MDL 587 liability constitutes "property damage" because the liability was imposed for loss of use of tangible property, including loss of use of docks, trucks and self-unloading vessels. They similarly assert that the liability was imposed for a diminution of value in such property. Relying on *Sola Basic Indus., Inc. v. U.S. Fidelity & Guaranty Co.,* 280 N.W.2d 211 (Wis. 1979) and *Lucker Mfg. v. The Home Ins. Co.,* 23 F.3d 808 (3d Cir. 1994), plaintiffs advance the following argument. The typical property damage provisions in standard comprehensive general liability ("CGL") policies do not require physical damage to tangible property, but instead provide coverage for damages awarded solely for diminution in the value of tangible property as well as the loss of use of such property. The typical "loss of use" clause in CGL policies was amended in 1973 to reflect coverage for loss of use of tangible property which had not been physically injured or destroyed, and a commentary bulletin accompanying the revision indicated that under the

typical 1966 standard policy coverage for such losses always was intended.[15] The MDL 587 claimants were injured by a delay in the utilization of self-unloaders. This resulted in the inability of the trucking and private dock companies to compete in the market, and the inability of the steel companies to use (1) self-unloaders, (2) private docks for unloading, and (3) the combination of private docks and trucks for inland transportation. Plaintiffs accordingly argue that the liability was imposed for economic losses caused by a loss of use of tangible property and as such it is a form of covered property damage.

Defendants contend that coverage is provided only for loss of use of or diminution in value in property resulting

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[15] Given the nature and magnitude of the dispute, the parties were permitted to engage in liberal discovery prior to a determination that various terms in the policies are or are not ambiguous. Plaintiffs were permitted to explore the drafting history of various provisions, including subsequent revisions or modifications thereof, in order to develop and present fully their position. *See, e.g., RTC v. Urban Redevelopment Auth.*, 638 A.2d 972, 975 (Pa. 1994) ("The parol evidence rule does not apply in its ordinary strictness where the existence of a custom or usage [in the trade] to explain the meaning of words in a writing is concerned [and] where terms are used in a contract which are known and understood by a particular class of persons in a certain special or peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject matter."). In addition, plaintiffs took the depositions of a number of lead underwriters for certain of the London market defendants. All such evidence has been considered carefully by the court, but is discussed or mentioned only to the extent necessary to explicate and resolve the issues presented. *Compare Sunbeam Corp. v. Liberty Mutual Ins. Co.*, 740 A.2d 1179, 1184-85 (Pa.Super. 1999) (although extrinsic evidence may be considered where contract language is ambiguous, to be probative of usage in the trade in demonstrating an ambiguity the evidence must bear on "a generally accepted and applied usage of the phrase by the insurance industry as a whole").

from actual property damage and the liability did not result from an actual injury to any tangible property. Defendants further argue that the damages were awarded solely for lost profits, and such losses cannot be construed as a loss of use of property within any reasonable construction of the language at issue.

The MDL 587 liability was not imposed "on account of . . . property damage. . . . " The liability reflected awards for lost savings and profits caused by the lack of competition and the inability of the dock and trucking companies to gain a foothold in the market. Plaintiffs' attempt to recharacterize this liability as a form of property damage fails for a number of reasons.

First, the liability was not imposed for damages on account of "the loss of or direct damage to or destruction of tangible property" within the meaning of the Insuring Agreement. When the policies were purchased the established reasonable expectation was that where the insured's conduct did not affect the physical ability to use a third-party's property, there was no property damage to or loss of use of the third-party's property under a policy which requires "injury to or destruction of tangible property." *See McDowell-Wellman Engineering Co. v. Hartford Accident and Indem. Co.*, 711 F.2d 521, 526 (3d Cir. 1983) (*citing, inter alia, Yakima Cement Products Co. v. Great American Ins. Co.*, 608 F.2d 254, 258-59 (Wash. 1980) (same)).[16] It

[16] The subsequent revisions by the industry made clear that the loss of use could be to property that was not "physically injured." The clarifications did not change the basic expectation that the loss of use must be causally related to damage to tangible property. The industry's subsequent expansion of the loss of use coverage did not retroactively

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also was the reasonable expectation that under a policy which covers "damages for loss of use of property resulting from property damage," there must be *property damage* before "there is coverage for any loss of use the damage caused." *Imperial Cas. & Indem. Co. v. High Concrete Structures, Inc.*, 858 F.2d 128, 136 (3d Cir. 1988).

In *McDowell-Wellman,* the insured built a [sic] ore bridge for a steel company that was used to supply raw materials to two blast furnaces. The bridge subsequently collapsed. The steel company sought damages for the repair and replacement costs and lost profits caused by additional costs in maintaining the blast furnaces while the repairs were being made.[17] The insured sought coverage under the theory that the business interruption loss constituted loss of use or diminution in the value of the blast furnaces. The lost production revenue was held not to constitute either type of loss because there was no injury to or destruction of the third-party's tangible property. Instead, the loss arose from the loss of use of the insured's product, the ore bridge. Because the blast furnaces remained operable and there was no form of damage to tangible property beyond the insured's product, there was no covered form of property damage and *a fortiori* there could be no loss of use or diminution in value therefrom.

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change this basic expectation and it is the intent of the parties at the time the contract was formed that provides the relevant focus in the matter at hand.

[17] After the ore bridge collapsed the steel company rented front-end loaders and bulldozers to move ore to the blast furnaces, stored additional ore at offsite locations, employed additional train crews and incurred similar disruption expenses. *McDowell-Wellman,* 711 F.2d at 523 n.4.

Here, there was no loss of, direct damage to, or destruction of, tangible property forming an essential element in or a substantial aspect of the MDL 587 plaintiffs' recoveries. Each MDL 587 plaintiff's tangible property remained operable for all intended physical and natural uses to which the property could be put. The dock companies were at all times able to use their property as commercial docks and the trucking companies were at all times able to use their trucks to provide transportation services. The trucking and dock companies sought lost profits that they would have made had they been able to establish themselves as competitors and reap the benefits of the additional business. The steel companies were at all times able to use their production equipment and merely sought lost savings from the reduced prices which competition would have produced. Thus the losses did not reflect compensation for some direct impact on particular tangible property, but instead were based upon various assumptions about what would have occurred if the market would have developed by natural economic incentives. Under these circumstances the principles of *McDowell-Wellman* demonstrate that the loss was not a covered form of property damage. *See also Lucker Manufacturing v. The Home Ins. Co.,* 818 F.Supp. 821, 827 (E.D.Pa. 1993) ("*McDowell-Wellman* plainly illustrates what is meant by 'loss of use,' in a typical CGL policy. Both the district court and the Third Circuit found that there was no 'loss of use' because the blast furnaces were capable of operating and producing steel as intended, despite the collapse of the ore bridge."), *aff'd on other grounds,* 23 F.3d 808 (3d Cir. 1994).

Plaintiffs' reliance on *Sola Basic* and *Lucker* is misplaced. Those cases involved situations where property

damage to or caused by the insured's product gave rise to a loss of use of a third-party's property. In *Sola Basic,* the failure of the insured's product, a transformer, rendered a third-party's blast furnace completely inoperable. As a result, the third party acquired alternative power and sought to recover the costs thereof from the insured. In determining that there was coverage for the complete interruption of operation, the Supreme Court of Wisconsin surveyed the persuasive authority from various jurisdictions and noted that the court in *Hamilton Die Cast, Inc. v. U.S. Fidelity & Guaranty Co.,* 508 F.2d 417 (7th Cir. 1975), held that damages for loss of investment, anticipated profits and good will are not recoverable from the mere inclusion of a defective component part where no physical damage to other property results therefrom. And although the *Sola Basic* court questioned the justification for continuing to require actual physical injury to tangible property in light of subsequent authority from an intermediate Illinois Appellate Court, the court also emphasized that the recovery in *Sola Basic* was for a complete loss of use of the third-party's property and did not represent lost profits, but instead measured the diminution in value of the plant caused by the additional costs incurred while the malfunctioning transformer was being replaced. *Accord Continental Casualty Co. v. Gilbane Building Co.,* 461 N.E.2d 209, 213 (Mass. 1984) ("Tangible property *rendered useless* is injured and hence covered, since the definition of damages includes 'loss of use of property resulting from property damage.'") (emphasis added) (*citing* 3. R. Long, *The Law of Liability Insurance,* App. B, §6 (1981)).

Lucker involved the issue of whether a clause providing for the "loss of use of tangible property that has not

been physically injured" covered the costs of correcting a defective component part which had been designed and was to be incorporated into a product which had not yet been manufactured. The court opined that the plain language of the clause covered an interruption of income caused by a wrongful act not accompanied by physical injury and further explained:

> The loss of a non-physical use of a product, such as offering it for sale, should be considered a "loss of use"; and . . . the decreased value of a product because of loss of customer acceptance of the product is a "loss of use" within the meaning of the standard CGL policy.

Lucker, 23 F.3d at 816. Thus the complete loss of a product made for a particular purpose caused by a change in the customer's acceptance of it constituted a loss of use of property that had not been physically injured. The court went on to hold, however, that at the time customer acceptance was lost, the component part still was being designed and thus it was a form of intangible property which had "no intrinsic marketable value of its own," similar to "investments," "good will" or "economic interest" in the form of profits, investment value and productivity. *Id.* at 819 (*citing* various Pennsylvania cases). Because the insured sought coverage for damages from the loss of the design itself, an intangible thing, the loss of use was not covered property damage. *Id.* at 820-21.

Here, none of the MDL 587 plaintiffs recovered for property which had been rendered useless or diminished in value because of the failure of physical property or a product belonging to B&LE. Instead, the liability was imposed for the loss of intangible property, *i.e.,* the ability

to compete and generate profits, gain investment values and increase productivity. Such losses consistently have been distinguished from forms of covered property damage. *See, e.g., Lazzara Oil Co. v. Columbia Cas. Co.,* 683 F.Supp. 777, 780 (M.D.Fla. 1988), *aff'd,* 868 F.2d 1274 (11th Cir. 1989) (lost profits and business good will awarded in antitrust price-fixing scheme were economic losses that did not "constitute damage or injury to tangible property" under CGL policies, nor were they a "loss of use of tangible property . . . within the scope of the . . . policies"); *L. Ray Packing Co. v. Commercial Union Ins. Co.,* 469 A.2d 832 (Me. 1983) (award for inability to compete from antitrust violations constituted loss of profits and thus was outside meaning of "property damage" in CGL policy); *Jefferson-Pilot Fire & Cas. v. Sunbelt Beer Distributors, Inc.,* 839 F.Supp. 376, 379 (D.S.C. 1993) (loss of earnings, benefits, earning capacity and reputation are economic losses which do not constitute damage or injury to tangible property) (*citing in support Giddings v. Industrial Indemnity Co.,* 112 Cal.App.3d 213, 169 Cal.Rptr. 278, 281 (1980)); *Gulf Ins. Co. v. L.A. Effects Group, Inc.,* 827 F.2d 574, 577 (9th Cir. 1987) ("strictly economic losses like lost profits, loss of good will, loss of anticipated benefit of a bargain and loss of an investment, do not constitute damage or injury to tangible property covered by a [CGL] policy"); *American States Ins. Co. v. Crawley Constr., Inc.,* 779 F.Supp. 137, 138 (M.D.Cal. 1991), *aff'd,* 5 F.3d 534 (9th Cir. 1993) (lost profits "simply do not relate to 'property damage' defined as 'physical injury to, destruction of or loss of use of, tangible property' "); *Waller v. Truck Ins. Exch., Inc.,* 900 P.2d 619, 626 (Cal. 1995) ("the focus of coverage for property damage is therefore the property itself, and does not include intangible economic losses [for] violation of antitrust laws"). In light of the bases for and

nature of the losses comprising the MDL 587 awards, *Sola Basic* and *Lucker* do not support plaintiffs' request for property damage coverage.

The Insuring Agreement does not provide coverage where there is no property damage to or actual loss of use of tangible property. In addition, the recoveries were for lost savings, lost investment opportunities and lost profits, all of which are economic losses that do not constitute a covered form of property damage. Under these circumstances defendants owe no duty of indemnification for property damage.

B. Advertising Liability

Plaintiffs assert that the MDL 587 liability constitutes "advertising liability" because B&LE was held liable for "unfair competition . . . arising out of . . . advertising activities." Plaintiffs note B&LE was held liable for competing unfairly and advance the following argument to support their implicit contention that the term "unfair competition" encompasses conspiracies in restraint of trade designed to preclude market entry of competitors and attempts to maintain a monopoly through oppressive and coercive conduct. The MDL 587 record establishes that B&LE (1) collected the same dock handling charges for self-unloaders and bulkers and (2) restricted commodity line-haul rates to railroad docks. These charges and rates were announced to the public through the railroad's tariffs, which were used to inform any potential market participants that there would be no financial advantage to using self-unloaders or developing/expanding related services. Handling charges and inland transportation rates were reflected in B&LE's tariffs, and thus the tariffs

constituted B&LE's primary form of advertising. Because the tariffs were used to implement the conspiratorial agreement by sending false price signals designed to remove any financial incentives to develop the self-unloader technology, plaintiffs contend that the MDL 587 liability was on account of unfair competition as used in defining "advertising liability" coverage.

Defendants argue that B&LE's tariffs were not a form of advertising because they merely were required regulatory filings and not promotional activities undertaken to generate business. Further, when read in its proper context, the term "unfair competition" does not encompass violations of the antitrust laws, which are designed to protect against injuries to competition in general and the improper manipulation of commerce. Finally, defendants argue that even if B&LE's tariffs are considered to be a form of advertising, there is no causal connection between the established injuries and any advertising or circulation of B&LE's tariffs.

Although plaintiffs' arguments have superficial appeal, they are flawed on multiple levels. First, the record fails to contain sufficient evidence to support the proposition that B&LE's tariffs were a form of advertising. Forms of advertising coverage, and thus an advertising injury creating liability, at their basic level denote a harm committed by the improper use of advertising or a style of doing business. *The Frog, Switch & Manufacturing Co.*, 193 F.3d at 746-50. The overwhelming majority of reported cases have interpreted the plain and ordinary meaning of "advertising" to mean the widespread distribution of promotional material to the public for the purpose of generating business. *See, e.g., Select Design, Ltd. v. Union*

Mutual Fire Ins. Co., 674 A.2d 798, 801 (Vt. 1996). Advertising, and advertising activities, "must involve actual, affirmative self-promotion of the actor's goods or services" and a mere motive to maintain business relations or increase business in some tangential way is insufficient to bring tortuous business conduct within the context of affirmative attempts to generate business. *Erie Ins. Group v. Sear Corp.*, 102 F.3d 889, 894-95 (7th Cir. 1996); *see also Select Design*, 674 A.2d at 801 (collecting cases holding plain and ordinary meaning of "advertising" unambiguously refers to widespread distribution of promotional material designed to generate business); *Bank of the West v. Superior Court of Contra Costa Co.*, 833 P.2d 545, 560 n.9 (Cal. 1992) (advertising means "widespread promotional activities directed to the public at large"). B&LE was required to "publish and file with the [ICC] tariffs containing [its] rates." 49 U.S.C. §10762(a)(1) (1982). The filing of tariffs with the ICC was a statutorily required prerequisite to assessing and collecting fees for services. B&LE was obligated to conduct business in a manner which conformed to its established tariffs. Public filing of the tariffs with the ICC was a mere act of acquiring legal approval to charge requested rates, it was not an activity designed to generate business from potential customers.[18]

[18] A similar analogy can be seen between the approval of the rates and charges of a utility company by a state's Public Utility Commission, and the separate promotional materials the utility company might distribute to the public for the purpose of generating consumption of its services and support for various aspects of its commercial development ventures. While interrelated, the approval of charges and rates by the Public Utility Commission is a statutory and regulatory prerequisite which remains distinct from the commercial business-generating activities of the utility company.

While B&LE's tariffs were filed publicly with the ICC, they lacked the character of widespread dissemination of information to the public for the purpose of generating business.

Second, plaintiffs' attempt to construe the term "unfair competition" as a virtual catch-all for any form of wrongful business conduct is contrary to the natural and ordinary meaning ascribed to that term in the context in which it is used and offends various principles of contract construction. Virtually all jurisdictions to address the area recognize that at its core the phrase covers the common law tort of unfair competition. *See, e.g., Bank of the West,* 833 P.2d at 550 (collecting cases); *Novell, Inc. v. Federal Ins. Co.,* 141 F.3d 983, 986 (10th Cir. 1998); *Curtis-Universal, Inc. v. Sheboygan Emergency Medical Services, Inc., et al.,* 43 F.3d 1119, 1123-25 (7th Cir. 1995) (Posner J.). The common law tort of unfair competition generally is understood as the act of passing off one's goods as those of another. *Bank of the West,* 833 P.2d at 551. This tort developed as an equitable remedy against the wrongful exploitation of trade name and common law trademarks. *Curtis-Universal,* 43 F.3d at 1123 ("Originally, 'unfair competition' just meant the infringement of an unregistered trademark."). Common forms of covered liability include the sale of confusingly similar products and exploiting a competitor's reputation. *Bank of the West,* 833 P.2d at 551 (citations omitted); *accord The Frog, Switch & Manufacturing Co.,* 193 F.3d at 747-49 (discussing various forms of "unfair competition" which have been held to be covered advertising injuries).

Moreover, while the outer reaches of "unfair competition" are debatable with regard to the arsenal of claims which can be advanced in the intellectual property arena,

the context in which the term is used precludes a sweeping expansion of the term to include all forms of modern business torts. The term is used in context with torts such as slander, libel or defamation; infringement of copyright, title or slogan; piracy or idea misappropriation; and invasion of privacy. While these terms have an expansive scope as to competition among competitors regarding representations concerning reputations, identity, quality of goods and services and so forth, it is

> highly implausible to suppose that "unfair competition" in a list of torts otherwise concerned mainly with harmful speech in various forms (defamation, invasion of the right of privacy, copyright infringement) would sweep under the policy a general . . . liability for antitrust damages.

Curtis-Universal, 43 F.3d at 1123. As Judge Posner further explained, any court should

> have misgivings . . . about interpreting "unfair competition" in the policy as broad as it might be interpreted in the modern law of business torts. A word sometimes picks up meaning from its neighbors; and all of the other terms in the list of wrongs insured under the rubric of "advertising injury" concern the misuse of information, as befits the word "advertising." Piracy and the infringement of copyrights, titles (presumably of books, songs, products, services, and so forth), and slogans (advertising and other) are simply different forms of theft (broadly conceived) of information. And defamation involves the use of false information, while invasion of the right of privacy the use of

> true, although misleading or offensive, information. Libel and slander are the two halves of defamation[.]

Id. at 1124. What these various offenses have in common "is injury to another that results from the content of statements about the products or services of the insured" and the overwhelming number of jurisdictions refuse to expand the terms beyond their context to the point where "any dispute related to economic competition among businesses is covered by the policy provision for advertising injury." *Select Design, Ltd.*, 674 A.2d at 802-03. For these reasons "the overwhelming majority of courts" have "rejected expansive dictionary definitions of 'unfair competition' that generally encompass harms to the public" and hold that the reasonable expectation of the term is limited to liability synonymous with or at least similar to the common tort of unfair competition. *Keating v. National Union Fire Ins.*, 995 F.2d 154, 155 (9th Cir. 1993). While the Supreme Court of Pennsylvania has held in other contexts that a host of various activities can constitute actionable unfair competition and the outer limits of the term have yet to be identified by that court, given the context in which the term is used the reasonable expectations doctrine cannot be used to expand it to encompass claims by consumers of a company's goods or services who have been injured through fraud or other intentional deceptive trade practices. *Granite State Inc. Co. v. Aamco Transmissions, Inc.*, 57 F.3d 316, 319-20 (3d Cir. 1995). The phrase contextually is limited to claims designed to protect a business from another's misappropriation of its business organization or its expenditure of labor, skill or money, *i.e.*, injury to reputation, product, manner of doing business, identification and so forth. *Id.* at 320. No such claim was advanced in the MDL 587 litigation and our

task is not to determine whether the term "unfair competition" is ambiguous in the abstract, but instead is limited to determining whether the contract when read as a whole reveals the term is ambiguous as used in the context of defining "advertising liabilities" with regard to the particular set of facts at hand. *Madison,* 735 A.2d at 107. When examined in this manner it is clear that plaintiffs' proposed interpretation far exceeds the acceptable boundaries of the reasonable expectation doctrine.[19]

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[19] While it is quite possible to argue in the abstract that the term "unfair competition" refers to various statutory claims designed to deter deception and fraud on the public, any such contention

> is defective as a matter of policy interpretation because it disregards the context. The policy does not purport to cover "unfair competition" in the abstract; instead, it covers "damages" for "advertising injury" caused by "unfair competition." Read in this context, the term "unfair competition" can only refer to a civil wrong that can support an award of damages.

Bank of the West, 833 P.2d at 545. And awards which seek to return money wrongfully acquired or deter wrongful conduct do not fall within the purview of "damages" as that term is used in insurance policies. *Id.* at 546 (collecting cases). "Damages" in the context of insurance generally is understood to encompass compensation awards for injuries to persons or property as measured by the cost of restoration. While the argument can be made, as plaintiffs suggest, that any award under the antitrust laws merely is designed to compensate the injured plaintiff having antitrust standing, the purpose of permitting suits for treble damages based upon market exclusion of potential low-cost competitors is to deter conduct which distorts the natural functioning of an economic market and the award in such a case is at least equally designed to transfer ill-gotten gains from those who have violated the law to those who have been deprived of opportunities by that violation. Of course, any such recovery is beyond an insured's reasonable expectation of the purposes of insurance and the meaning of the term "damages." *Id.* at 547-48. *See also O'Neill Investigations v. Ill. Emp. Ins.,* 636 P.2d 1170, 1173-77 (Alaska 1981) (restoration of money acquired through

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Finally, and most importantly, the MDL 587 liability was not caused by B&LE's advertising or its tariffs. Coverage is provided only for those injuries "committed in any advertisement . . . and arising out of . . . advertising activities." Thus, there must be a sufficient nexus between the perpetrated harm and the insured's advertising. When this nexus is not present some courts hold that the prerequisite of advertising has not been established while others hold there is an insufficient causal connection between the insured's advertising and the underlying injury. Plaintiff's evidence is deficient under either approach.

Under Pennsylvania law an injury and any resulting liability does not become an advertising activity merely because the insured commits a business tort and then advertises the result. *The Frog, Switch & Manufacturing Co.,* 193 F.3d at 744. In other words, the mere dissemination of wrongful conduct through advertising does not convert the underlying harm into a form of advertising activity. *Id.* In *The Frog, Switch & Manufacturing Co.,* an insured misappropriated a competitor's trade secrets and confidential business information, created a product, and then advertised that product. The insured was sued for

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unfair collection practices not award of "damages" as term is used in insurance policy); *Central Dauphin School v. American Cas. Co.,* 426 A.2d 94, 95-97 (Pa. 1981) (return of improperly collected taxes not a loss); *cf. Seaboard Sur. Co. v. Ralph Williams' Northwest Chrysler Plymouth, Inc.,* 504 P.2d 1139, 1140-43 (Wash. 1981) (restoration awards from violation of statutory offense of unfair methods of competition in injunctive action by state attorney general not damages within meaning of insurance policy).

theft of trade secrets, unfair competition and false advertising and reverse passing off under the Lanham Act, 15 U.S.C. §1125(a), which prohibits false or misleading deceptions of fact in commercial advertising. The court held that "to be covered . . . , allegations of unfair competition or misappropriation have to involve an advertising idea, not just a non-advertising idea that is made the subject of advertising." *Id.* at 748. Thus, where the injury arises from a distinct and separate wrong and not from the advertising itself, it is not an injury caused by advertising. *Id.* at 746-48; *accord Select Design, Ltd.*, 674 A.2d at 802-03 (mere tangential connection between underlying tort and general manner of generating business is insufficient justification to manipulate or force-read the policy language to find "advertising" or "advertising injury"); *Novell, Inc.*, 141 F.3d at 986-89 (misappropriation of competitor's product followed by advertising of wrongdoing did not convert underlying claims into advertising injury).

Other authorities similarly recognize that coverage for an enumerated tort only is triggered where there is a causal connection between the underlying harm/injury and the insured's advertising activities. In *Simply Fresh Fruit, Inc. v. Continental Ins. Co.*, 94 F.3d 1219 (9th Cir. 1996), the court considered whether claims seeking relief for destruction of economic advantage based on misappropriation of trade secrets (theft of a process used to slice fruit) and patent infringement identified injuries potentially within the scope of common law unfair competition where the insured promoted its "new" process to increase its production. Applying the principle that "any 'advertising injury' must have a causal connection with the insured's 'advertising activities' before there can be coverage," the court focused on the underpinnings of the claims and held

they were independent of any advertising activities. Exploiting the wrongful conduct through promotional activity was insufficient because "advertising activities must cause the injury – not merely expose it." *Id.* at 1221-1223 (*citing, inter alia, Microtec Research, Inc., et al. v. Nationwide Mutual Ins. Co., et al.,* 40 F.3d 968 (9th Cir. 1994)); *see also Novell, Inc. v. Federal Ins. Co.,* 141 F.3d 983, 988 (10th Cir. 1998) (advertising injury is not established where insured merely advertises competing product allegedly gained by misappropriation); *Robert Bowden, Inc. v. Aetna Cas. & Sur. Co.,* 977 F.Supp. 1475, 1479 (N.D.Ga. 1997) ("the overwhelming majority of courts which have addressed the issue have held that there must be a causal connection between an insured's advertising and the alleged injury").[20]

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[20] The Third Circuit has suggested, albeit in *dicta,* that a causation analysis should not simply inquire into whether the underlying tort occurred independent of the insured's advertising, but instead should focus on whether the insured's advertising itself caused an actionable harm which became a substantial factor in bringing about the third-party's injuries. Because the court resolved the issues before it in *The Frog, Switch & Manufacturing Co.* by a straightforward determination that the underlying complaint did not allege advertising injury, it did not definitively resolve the insurer's arguments that there was no causal connection between the insured's advertising activities and the third-party's alleged injuries. Chief Judge Becker nevertheless observed that a number of courts "have conflated the requirement of 'advertising injury' as defined in the standard policy with the requirement that the injury occur in the course of advertising, with the unfortunate result that they have distorted standard causation principles." The court opined:

> Some courts have solved the problem by requiring that the injury be complete in the advertisement, requiring no further conduct. *See, e.g., Cahill v. Liberty Mut. Ins. Co.,* 80 F.3d 336, 339 n.3 (9th Cir. 1996)

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Here, even assuming B&LE's tariffs constituted a form of advertising, the MDL 587 liability was not based upon nor did it arise from the rates and charges established by those tariffs. B&LE enjoyed ICA immunity with regard to its rates and charges, and the tariffs reflecting those rates and charges had to be accepted as lawful and reasonable. *In re Lower Lake Erie,* 998 F.2d at 1159. The jury specifically was instructed that it could not find liability based upon any rate-related activity leading to a duly filed tariff. It was the railroads' collective refusal to (1) permit the unrestricted sale or lease of dock property and (2) implement lower rates for handling ore shipped on self-unloaders as well as their boycott of private docks and refusal to establish lower line-hauling rates from those docks that gave rise to the recoverable "damage claims based on non-rate activity that targeted potential low-cost competitors." *Id.* at 1159. It was the affirmative "evidence

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> (discussing California approach); *Dogloo,* 907 F.Supp. at 1390 ("the cases . . . illustrate that advertising injury coverage does not extend to cases in which advertising alone is not actionable."). *We believe this formation is a reasonable way to limit the scope of causation.* Thus, if an advertisement invaded a person's privacy (causing an advertising injury), and the insured's product also invaded a person's privacy (causing an advertising injury), the advertisement would cause part of the total harm and would constitute a complete tort in itself. In such a case, we think that there would be a duty to defend. *See id.* The duty to indemnify, however, would be limited to the harm caused by the advertisement.

Id. (emphasis added). Thus, the causation question is not whether the injury could or would have occurred without the advertising, but instead is whether the advertising activity was a complete and actionable injury in itself.

of the railroads' refusal to handle self-loaders at their docks, restrictions on the sale and lease of dock property to unregulated entities, boycotts of unregulated docks, and intra-industry coercion claims" which constituted the core underpinnings of the MDL 587 liability. *Id.* at 1160. It was this activity, in conjunction with collective coercion to perpetrate it, that caused the injuries not barred by ICA immunity.

It is beyond question that there was no advertising idea forming any element of the MDL 587 plaintiffs' claims of recovery and the underlying liability and damages arose solely from conduct necessarily independent and unrelated to any claimed advertising. The MDL 587 plaintiffs were barred as a matter of law from recovering on claims of improperly inflated rates and charges. Under these circumstances, the fact that B&LE's tariffs may have been used in some tangential manner to further the goals of the conspiracy or calculate the quantum of recoverable damages sustained by the steel companies does not convert the underlying liability into a form of advertising liability under Pennsylvania law. *Compare The Frog, Switch & Manufacturing Co.,* 193 F.3d at 744. For these same reasons the requisite nexus to advertising activities is virtually nonexistent. *Id.* at 750 n.8. Pennsylvania law does not impose an obligation of indemnification on defendants under such circumstances.

C. Personal Injury

Plaintiffs' effort to establish that the liability was imposed on account "personal injuries" fails for similar reasons. Plaintiffs observed that "'personal injuries'" is

defined to "mean . . . discrimination . . . " and advance essentially the following in support of this theory:

> The lead witnesses for the London defendants uniformly acknowledged that liabilities arising out of "economic discrimination" were within the general scope of "discrimination" coverage and that the policies issued to USX expressly excluded coverage for "discrimination . . . because of race, creed, color or national origin." The Fifth Edition of *Black's Law Dictionary* defines "discrimination" in the context of a common carrier as "a breach of the carrier's duty to treat all shippers alike" and further defines "economic discrimination" to mean "[a]ny form of discrimination within the field of commerce." *Black's Law Dictionary,* 420 & 460 (5th ed.1979). "Price discrimination" is defined as occurring where "a buyer pays a price that is different from the price paid by another buyer for an identical product or service [which] is prohibited if the effect of this discrimination may be to lessen substantially or injure competition. . . . " *Id.* at 1070. There also are similar definitions in the 1934 edition of *Webster's New International Dictionary* and the 1981 edition of *Webster's Third New International Dictionary* defines discrimination as
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> > the act, practice or an instance of discriminating categorically rather than individually – . . . b. the act or practice on the part of a common carrier of discriminating (as in the imposition of tariffs) between persons, localities, or commodities in respect to substantially the same service. . . .
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> *Webster's Third New International Dictionary,* 648 (1981). This definition parallels the treatment of "discrimination" as used in the ICA, *see*

> 49 U.S.C. §§2, 3, and the United States Court of Appeals for the Seven [sic] Circuit has held that the term "discrimination" as used in the definition of "personal injury" can encompass a claim for "price discrimination." *See Federal Ins. Co. v. Stroh Brewing Co.,* 127 F.3d 563 (7th Cir. 1997) (beer manufacturer's staggered price discount for volume purchases challenged in complaint alleging price discrimination against small wholesalers under Robinson-Patman Act and Indiana beverage laws recognized as a covered form of price discrimination).

From these premises plaintiffs argue that the term "discrimination" can only be understood as covering "the predominate [sic] type of discrimination for which B&LE, as a common carrier railroad, could be found liable."

Plaintiffs then advance the following to support their contention that the MDL 587 litigation was a classic tale of economic and price discrimination:

> "To redress the resulting injury to competition, the MDL 587 plaintiffs chose to assert their legal claims under federal and state antitrust laws, although full remedies for discriminatory rate actions, including damages, were available under the [ICA] and the common law." The various complaints alleged facts which would have supported causes of action under the ICA's prohibitions against "carriers . . . charging different rates for doing like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," *Atchison, Topeka and Santa Fe Ry. Co. v. United States,* 549 F.2d 1186, 1188-89 (8th Cir. 1977), and the ICC was authorized to investigate such claims of discrimination and to enjoin any

> violation of the ICA, which prohibited any railroad rate or charge from being unjustly discriminatory. In addition, the ICC was directed through the National Transportation Policy to prevent all "unfair or destructive competitive practices." *See* 49 U.S.C. §§8, 9, 13(1)-(2), 16(1) (repealed 1996). The underlying complaints actually alleged "defendants instituted a policy of rate discrimination" and the MDL 587 plaintiffs proved the actionable restraint of trade was implemented by discriminatory (1) decisions to apply the same service charges for self-unloaders and bulkers, (2) refusals to make available lower transportation rates for ore shipped to private docks and (3) refusals to sell or lease property for use as a private dock.

Plaintiffs then argue:

> [t]he fact that the MDL plaintiffs chose to bring a treble damage action under federal and state antitrust laws rather than an action under the ICA does not alter the nature of the underlying course of conduct for which coverage is sought. Nor does the MDL plaintiffs' choice of legal theories determine whether the policies cover B&LE's MDL liability.

Plaintiffs' Memorandum in Support (Document No. 451) at p. 26 n.17.

Because various facets of the conspiracy may have supported a claim for discrimination under the ICA and were implemented through the railroads' failure to draw meaningful distinctions between various services, which the juries found could have and should have been drawn, plaintiffs argue that the liability was imposed on account

of discrimination within the meaning of "personal injuries."[21]

The defendants contend that the MDL 587 plaintiffs legally were precluded from presenting to the jury any claims for "discrimination" under the ICA and the court's charge and the juries' verdict did not establish any findings which would establish such a claim. Defendants specifically assert that any such claim was precluded by the doctrine of primary jurisdiction under the ICA and that it is entirely speculative to embark on an attempt to transform the underlying liability into an ICA claim for discrimination. Similarly, they contend that common law discrimination could not be established as a matter of law.

The context in which the term "discrimination" is used once again sufficiently undercuts plaintiffs' attempt to rewrite the policy under the reasonable expectations doctrine and principles of insurance law regarding ambiguities. It may be as the majority stated in *Stroh Brewing* that "[t]ime was, 'discrimination' might have brought immediately to mind charging one person more than another for the same product." *Stroh Brewing,* 127 F.3d at 546. To suggest, however, that the use of that term in defining "personal injuries" was intended to identify a distinct form of statutory liability created 85 years ago by

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[21] Plaintiffs also assert that the railroads' conduct could have been pled as a common law claim for unjust discrimination in light of the Supreme Court of Pennsylvania's recognition in *Schwartz v. Laundry & Linen Supply Drivers' Union,* 14 A.2d 438 (Pa. 1940), that the federal antitrust laws codified the common law doctrine of restraint of trade in the field of interstate commerce. Prior to the Sherman Act Pennsylvania common law recognized a cause of action for unjust discrimination in *Borda v. Philadelphia & Reading R. Co.,* 141 Pa. 484 (1891).

the Sherman Act and commonly known as "antitrust liability" stretches the term beyond any natural and ordinary meaning to be gleaned from its use in context. The term is preceded by "false arrest, false imprisonment, wrongful eviction, detention [and] malicious prosecution" and is followed by "humiliation [and] libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any advertising activities." The terms preceding the phrase identify offenses against the individual for wrongful deprivation of liberty or interference with the right to peaceful possession of property and those that follow it identify common offenses which injure the character or reputation of an individual. Of course, "discrimination" and its companion "humiliation" are forms of disparate or demeaning treatment of persons commonly accomplished through unjust economic treatment, and such terms are indeed related to forms of "mental injury, mental anguish [and] shock" as their contextual placement within the policy demonstrates. And price discrimination claims may well be analogous to this understanding in certain settings. But to suggest that hiding among these causes of harm to the person included in personal injury coverage is a form of discrimination which encompasses broad-based economic practices which injure markets through the improper elimination of competition accomplished by purposeful manipulation of goods and services reflects a highly implausible definition or meaning of that term.

Moreover, grants of coverage in a standard CGL policy are designed and intended to identify categories of claims which commonly are asserted against a broad class of potential insureds. To suggest that it is reasonable to

assume that a term has suddenly undergone a metamorphosis and transformed itself into a claim unique to large common carriers governed by the ICA, which would be a minute fraction of the potential consumers of the insurance industry, is at the least extraordinary. We venture to suggest that a sophisticated commercial entity such as USX, which listed a significant number of named insureds on its application, would be surprised to learn in the application process that the term "discrimination" as used in the context of "personal injuries" was a synonym for distinct statutory claims under the ICA or general claims under the antitrust laws, and by implication that part of its premium dollars would be spent protecting other insureds from these types of claims. Furthermore, the partial exclusion of certain forms of discrimination in the policies did not undermine the ordinary and natural meaning of the term or reduce the coverage to only that form of discrimination advanced by plaintiffs. The exclusion merely eliminated the most invidious forms of discrimination: those based on race and national origin. There is no question that at a minimum coverage for discrimination against individuals based on gender, religion, and age remained. When a court is confronted with allegations of ambiguity based upon a reading of a phrase which is divorced from its contextual use, the requirement that the two competing interpretations both be reasonable is not satisfied and it is improper to attempt to shoehorn the language or otherwise use a contrivance to create coverage where the plain language suggests none was intended. *See, e.g., Madison Construction Co.,* 735 A.2d at 106-07; *Peerless Ins. Co. v. Wells,* 580 A.2d 485, 488 (Vt. 1990) (ambiguity not created by differences in conclusions reached by courts where alternative meaning is based on contrived and forced reading of policy language);

Curtis-Universal, 43 F.3d at 1123-25 (a meaning ascribed to policy term will not be a reasonable interpretation where that meaning is divorced from the term's contextual usage and the common understandings in the industry).

Even assuming *arguendo,* however, that the term is ambiguous and reasonably capable of encompassing some forms of broad-based price discrimination against commercial entities, a second fundamental shortcoming with plaintiffs' arguments on this score is that this court does not now have the liberty to recharacterize the underlying liability into a group of facts which may potentially support a claim for coverage under a hypothetical set of circumstances. When the ten actions were filed between 1982 and 1984, the ICA contained two provisions prohibiting discrimination. The ICA provided:

> A [railroad] . . . may not charge or receive . . . a different compensation (by using a special rate, rebate, drawback or other means) for a service rendered . . . in transportation the [railroad] may perform under this subtitle than it charges or receives from another person for performing a like or contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. A [railroad] that charges or receives such a different compensation for that service unreasonably discriminates.

49 U.S.C. §10741(a) (1982). The second provision provided: "a [railroad] . . . may not subject a person, place, port or type of traffic to unreasonable discrimination." 49 U.S.C. §10741(b) (1982).

Judge Fullam did not charge the juries to consider whether B&LE committed the elements of ICA discrimination. To the contrary, B&LE's §5(a) immunity under the ICA and the *Keogh* doctrine precluded as a matter of law any claim based on the theory that the rates charged were improper or otherwise discriminatory and all claims based on the rates charged by the railroads were dismissed. The relevancy of the allegations in the complaints to this effect likewise then dropped from the case. Furthermore, B&LE argued in the (1) criminal proceeding, (2) district court civil proceeding and (3) civil appellate proceeding that the claims against it could only be brought under the ICA and therefore the ICC had initial jurisdiction over the claims under doctrine of "primary jurisdiction." *See Great N. Ry. Co. v. Merchants Elevator Co.,* 259 U.S. 285, 291 (1922) ("whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory [under the ICA], there must be preliminary resort to the Commission . . . because the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission"); *Keogh,* 260 U.S. at 164 (the ICC "must determine whether a rate is discriminatory; at least, in the first instance").

The proposition that B&LE's liability was not price discrimination under the ICA or predicated on a synonymous theory conclusively is established in the MDL 587 record. Indeed, "[i]n a series of pre-trial rulings, the district court dismissed the steel companies' claims for damages based on the allegation that, absent the conspiracy, these plaintiffs would have paid lower rates for costs associated with the transportation of ore." *In re Lower Lake Erie,* 998 F.2d at 1154. The damage claims by the steel companies that were considered by the jury were

based upon the "defendants' elimination of competitive non-railroad dock facilities," which were not "rate-related, because they required proof that the defendants conspired to exclude low cost competitors from the market" and the dock and trucking companies' claims were those of the competitors excluded from the market. *Id.* In contrast, the steel companies' claims that they would have paid vessel companies a lower rate for lake transportation absent the conspiracy also were dismissed as potentially duplicative and speculative. *Id.* As a result, the damage claims which survived were limited solely to B&LE's anti-competitive market-exclusion activities. In judicially concluding that the recoveries were independent of price or rate discrimination under the ICA, the Third Circuit explained:

> [w]e recognize that the success of anticompetitive non-rate activity would coincidentally implicate rates promulgated under the jurisdiction of the ICC. It is fully consisted with *Keogh,* however, to accept these rates as lawful and nonetheless to conclude that through non-rate activities, particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors, the railroads effectively retarded entry of lower cost competitors into the market. The instrument of damage to the steel companies was the absence of the lower-cost combination. . . .
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> * * *
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> The proof required to show the harm alleged here thus differs from that deemed objectionable in *Keogh.* In this case, the plaintiffs showed that the railroads conspired to protect their stronghold in the ore

> transportation market by blocking entry by low-cost competitors, *not that the railroads charged an unlawful rate.*

Id. at 1159 (emphasis added). B&LE repeatedly argued that the claims against it were based on rate-setting activities and initial jurisdiction over them belonged with the ICC; repeatedly B&LE's argument was found to be unavailing with regard to the market exclusion claims which reached the jury. *Id.* at 1162-63.

Finally, and importantly, while B&LE did discriminate against private docks by withholding its services and/or refusing to provide lower rates or charges for the services it rendered, liability was not imposed for this conduct because B&LE had a legal right to engage in this conduct on its own. Liability was imposed for its knowing and intentional participation with others in an illegal conspiracy, a matter wholly separate and distinct from any decision it made on its own to withhold services or maintain its established rates. It is thus beyond question that any theory of economic discrimination in the setting and collecting of rates and charges was not a basis for the MDL 587 liability and damages.

Under Pennsylvania law an insurance contract which requires covered "damages" to "arise out of" certain specified forms of tort liability obligates the insured to establish "but for" causation. *Roman Mosaic & Tile Co. v. Aetna Cas. & Sur. Co.,* 704 A.2d 665, 669 (Pa.Super. 1997). In other words, "[c]onstrued strictly against the insurer, 'arising out' means causally connected with, not proximately caused by." *Id.* at 669 (*citing, inter alia, Manufacturers Cas. Ins. Co. v. Goodville Mutual Cas. Co.,* 170 A.2d 571 (Pa. 1961)). Thus, an insurer's duty of actual indemnification is triggered only when the essential elements of

the claims established arise out of the specific torts enumerated in the policy or ones synonymous therewith. *Id.* The mere identification of an item of damage (*i.e.* bodily injury, mental anguish and so forth) which is not causally connected with and integrated into a claim covered by the policy is insufficient to trigger the insurer's duties thereunder. In light of (1) the claim of recovery in MDL 587, (2) the nature of the factual allegations established in support thereof and recovered upon, (3) the essential elements establish by the juries and (4) the circumscribed scope of damages recovered, both the contract law of indemnity agreements and the principles of *res judicata* preclude this court from recharacterizing that liability into a different theory of covered liability not established by the judgments upon which plaintiffs found their claims for indemnification. *Builders Supply Co.,* 77 A.2d at 373; *Murphy Oil,* 962 S.W.2d at 740; *Madison,* 735 A.2d at 109 (emphasizing that "arising out of" as used in insurance policy signifies a "but for" or "cause and result" relationship) (*citing in support McCabe v. Old Republic Ins. Co.,* 228 A.2d 901, 903 (Pa. 1967)); *Springfield Twp. v. Indemnity Ins. Co. of North America,* 64 A.2d 761, 762 (Pa. 1949) (it is the "nature of the claim" which determines whether the insurer's duties have been triggered). It follows that defendants owe no duty of indemnification for personal injury liability.

D. An Occurrence

Plaintiffs contend the MDL 587 liability arose from "an occurrence" as defined under Pennsylvania law and advance the following in support. The occurrence was "the agreement, its implementation and the continuous exposure to the anticompetitive conditions arising therefrom,"

which in turn produced a non-linear, progressive economic injury resulting in unexpected and unintended damages. The "accidental" / "unintended and unexpected" limitation in the definition of occurrence does not preclude coverage because numerous intentional business torts are covered by the Insuring Agreement and B&LE's intent to violate the antitrust laws was not an issue in the MDL 587 litigation. Any public policy defense is strong medicine which is disfavored and applicable only in the clearest cases. Thus, because B&LE had numerous defenses to the claims and did not expect or intend the resulting losses, the fortuity requirement is satisfied.

Defendants' [sic] contend that antitrust liability imposed for restraint of trade and monopolization epitomizes the essence of intended and inspected harm and a non-fortuitous loss, thus precluding coverage under the definition of occurrence and creating liability which is uninsurable as a matter of Pennsylvania public policy. Defendants once again argue the MDL 587 record conclusively demonstrates that this essential term cannot be established.

The Insuring Agreement defines an occurrence as

> an accident, . . . happening, . . . event, or . . . exposure to conditions, which unexpectedly and unintentionally results in a [covered form of damage/injury] during the policy period.

Pennsylvania law has long recognized that this definition requires an accidental event or happening with an element of fortuity. *Gene's Restaurant, Inc. v. Nationwide Ins. Co.*, 548 A.2d 246, 247 (Pa. 1988). Generally focusing on the cause of the loss is the primary inquiry in determining the existence of an occurrence. *D'Auria v. Zurich Ins. Co.*, 507

A.2d 857, 860-61 (Pa.Super. 1986) ("The general rule is that an occurrence is determined by the causes of the resulting injury."). Thus, there must be an accident or fortuitous event which causes a covered loss.

Plaintiffs devote considerable effort in demonstrating that antitrust liability in and of itself is not *per se* uninsurable and that other courts have recognized that claims of antitrust liability can trigger an insurer's duties to defend and indemnify. *See Stroh Brewing,* 127 F.3d at 568 (claims by single small distributor against single manufacturer based on volume discount pricing under Robinson-Patman Act, which "prohibits discrimination generally," triggered personally injury coverage because claims were common in industry of insured which often utilized legal cost-justified quantity discounts); *Ethicon, Inc. v. The Aetna Cas. and Sur. Co.,* 737 F.Supp. 1320, 1328 (S.D.N.Y. 1990) (common law claim for malicious prosecution styled as antitrust claim triggered coverage under personal injury, which included malicious prosecution claim coverage). With this general proposition we do not disagree. The task at hand, however, is not to determine theoretically whether some forms of antitrust liability may be fortuitous and sufficiently analogous with state law claims that are covered in some fashion under some of the various policy forms in circulation; instead, our course necessarily entails an application of the policy language and Pennsylvania law to the underlying liability for which coverage is sought.[22]

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[22] Plaintiffs' argument regarding the lack of an antitrust exclusion is without force for the same reason. Plaintiffs assert that the lack of an antitrust exclusion in the policies, coupled with the industry's drafting

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As an initial matter, the parties dispute who bears the burden of proving the fortuity or lack thereof of the loss. The fortuity requirement in the Insuring Agreement is expressed in the definition of occurrence, which requires the accident or event causing the liability to be unintended and unexpected. Defendants argue the insured should bear the burden of proving this requirement because it is straight-forwardly set forth in the affirmative grant of coverage. In contrast, plaintiffs argue that the "unexpectedly and unintentionally" provision is a limitation on coverage, the proof of which properly is assigned to defendants.

The rule of fortuity embodies a fundamental principle of Pennsylvania public policy "not to enforce an insurance coverage contract providing coverage for a non-fortuitous loss." *Koppers Co., Inc. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1447 (3d Cir. 1996). And where there is at least a prima facie basis upon which to argue that a loss is fortuitous, the burden is shifted to the insurer to demonstrate that the loss falls outside the scope of coverage or is

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and incorporation of such an exclusion as early as 1988, supports their arguments for coverage because if there was no intent to provide coverage for conduct giving rise to antitrust liability, then no exclusion would be necessary, or at a minimum the subsequent addition of an antitrust exclusion reveals the policies were ambiguous and an insured reasonably could expect such liabilities to be covered. In addition to the hypothetical nature of this argument, the almost infinite number of possible scenarios which could arise in intellectual property disputes involving competition and advertising, particularly in more recent times, could easily explain the use of such an exclusion. In all events, the question is whether the Insuring Agreement covers the antitrust liability imposed against B&LE and relying on a negative inference does little to advance plaintiffs' affirmative obligation to establish the loss is covered by the grant of coverage.

otherwise uninsurable as a matter of public policy. *Id.* Because we agree with plaintiffs' general contention that there are many forms of antitrust liability and a claim labeled as such is not necessarily precluded from being within the scope of an insurance policy, *see Curtis-Universal,* 43 F.3d at 1125 (rejecting argument that price-fixing claim in complaint which also contained covered advertising injury claim necessarily alleged antitrust criminal activity), the burden properly is placed on defendants to demonstrate the loss was non-fortuitous or the coverage sought is contrary to public policy. *But see Gene's Restaurant,* 548 A.2d at 247 (treating potential liability from intentional tort as failing to establish fortuitous character of an accident); *Erie Ins. Group,* 102 F.3d at 893 (where language is in coverage grant and serves to define scope and purpose of provision, insured has burden to prove provision applicable).

In construing policy provisions limiting coverage for intentional acts, the Supreme Court of Pennsylvania has drawn "a very real distinction between intending an act and intending a result" and has opined that such provisions do not address intentional acts in themselves, but instead are concerned with damage or harm intentionally caused by the insured. *Eisenman v. Hornberg,* 264 A.2d 673, 674 (Pa. 1970) Thus, "before the insurer may validly disclaim liability, it must be shown that the insured intended by his act to produce the damage which did in fact occur." *Id.*

More recently, Pennsylvania courts follow the decision in *United Services Automobile Assoc. v. Elitzky,* 517 A.2d 982 (Pa.Super. 1986), *appeal denied,* 528 A.2d 957 (1987), in determining whether coverage is excluded under an intentional act limitation. *Wiley v. State Farm Fire & Cas.*

Co., 995 F.2d 457, 460 (3d Cir. 1993). *Elitzky* established four important principles. A clause excluding coverage for intended or expected events "is ambiguous as a matter of law and must be construed against the insurer." *Elitzky,* 517 A.2d at 989. Clauses of this nature exclude "only injury and damage of the same general type which the insured intended to cause [and an] insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially certain to result." *Id.; see also Aetna Cas. & Sur. Co. v. Roe, et al.,* 650 A.2d 94, 100 (Pa.Super. 1994) ("An insured intends an injury if he/she desires to cause the consequences of his/her act or if he/she acted knowing that such consequences were substantially certain to result.") (*quoting Stidham v. Millvale Sportsmen's Club,* 618 A.2d 945, 953 (Pa.Super. 1992), *appeal denied,* 637 A.2d 290 (1993)). In other words, under Pennsylvania law "it is not sufficient that the insured intended his actions; rather, for the resulting injury to be excluded from coverage, the insured must have specifically intended to cause the harm." *Id.* (*citing in support Eisenman,* 264 A.2d at 674-75). The "expected" component of the phrase denotes "an element of conscious awareness on the part of the insured" and therefore "intended" and "expected" "are synonymous for the purposes of insurance exclusionary clauses." *Elitzky,* 517 A.2d at 979-80. And, for the purposes of enforcing such clauses, Pennsylvania's public policy is coterminous with the force and effect of the exclusionary clause. Thus, under Pennsylvania law a subjective standard applies which is dependent upon whether the insured intended to cause damage of the same general type for which he has been held accountable. *Id.; Aetna Life and Cas. Co. v. Barthelemy,* 33 F.3d 189, 191 (3d Cir. 1994) (Pennsylvania applies "subjective intent" analysis).

Whether an event was fortuitous or expected and intended is assessed from the standpoint of the insured. *Nationwide Fire Ins. Co. v. Pipher,* 140 F.3d 222, 227 (3d Cir. 1998). Although the subjective standard imposes a heavy burden on an insurer, consideration of the nature of the third-party's injury is essential and certain intentional torts such as assault and battery demonstrate an intent to produce a general type of harm which is controlling in the particular case. *Gene's Restaurant,* 548 A.2d at 247 (malicious, willful assault and beating can never be an accident). In other situations intent to harm may presumptively arise if the insured is held liable for a claim that contains elements which inferentially establish an intent to harm, but such a determination is appropriate only where any potential liability for recklessness or negligence under the same cause of action advanced against the insured has been eliminated. *Elitzky,* 517 A.2d at 989. For example, where an insured is held liable for intentionally defaming another with statements the insured knows to be false, "an intent to harm might be presumed." But where it is "possible that the [insured] recklessly disregarded the truth and libeled [the third-party] yet did so with [a] pure heart," the insurer may be called upon to defend the defamation action. *Id.* In making an assessment in any particular situation the probability that certain consequences will follow from a particular act is an important aspect of the analysis. *Id.* (*citing* Restatement (Second) of Torts, §8A).

The fact that the insured has pled guilty to a crime does not necessarily bar coverage where the elements do not establish that the insured intended to cause the harm resulting from the criminal act. *Stidham,* 618 A.2d at 952; *Eisenman,* 264 A.2d at 674-75 (insured's burglary of home

not a bar under intentional acts exclusion where resulting damage arose from unintentional fire caused by use of matches to see at night). Any criminal conduct to which the insured has pled guilty may be considered, however, and such convictions are conclusive evidence of the criminal acts established by the prosecution. *Stidham,* 618 A.2d at 952. Even where the insured has pled guilty to a crime, however, *Elitzky*'s subjective intent analysis remains relevant and careful consideration must be given to what the record does and does not establish. *Wiley,* 955 F.2d at 466-67. Inferring subjective intent is inappropriate where the underlying conduct merely is capable of being construed as a criminal act but material issues exist regarding the insured's subjective intent to cause the harm. *Barthelemy,* 33 F.3d at 192-93. Similarly, the subjective intent standard is not met where an insured negligently violates a federal civil statute in good faith. *BLaST Intermediate Unit 17 v. CNA Ins. Co.,* 674 A.2d 687, 691 (Pa. 1996) (insurance indemnification for "negligent but good faith violation of the Equal Pay Act" does not violate Pennsylvania's public policy prohibiting insurance recovery for intentional violation of a statute).

The Supreme Court of Pennsylvania has considered the rule that public policy does not permit insurance coverage for non-fortuitous losses in four cases. In determining whether public policy precludes coverage for the act in question, the court has considered the following common factors:

> 1) whether gain was derived from an illegal act or the insured suffered a loss by being legally required to compensate an injured third party;

> 2) whether permitting coverage would encourage others to engage in intentional unlawful activity for the purpose of reaping a benefit; and
>
> 3) whether permitting recovery would permit the insured to escape the consequences flowing from criminal or intentional and malicious conduct.

See Gene's Restaurant, Inc. v. Nationwide Ins. Co., 548 A.2d 246, 247 (Pa. 1988); *BlaST,* 674 A.2d at 690-91; *Eisenman,* 264 A.2d at 265; *Central Dauphin School,* 426 A.2d at 96-97.

Relying on *BLaST* and *Eisenman,* plaintiffs argue that the MDL 587 record demonstrates B&LE had a good faith belief that it was acting in compliance with the law. To support this proposition plaintiffs' reference the following. Judge Fullam made a post-trial finding in denying the MDL 587 plaintiffs' request for prejudgment interest under the Ohio Valenteen Act that B&LE may well have entertained the good-faith belief that it had meritorious defenses to the liability. He explained:

> In the circumstances of this litigation, [B&LE] could well have entertained a good-faith and not unreasonable belief that it had no liability to the plaintiffs. Although the evidence of the overall conspiracy among the defendant railroads was compelling, most of that evidence related to the pre-limitations period, and very little of it related to defendant B&LE. There was a legitimate argument that, regardless of the improprieties which may have been committed by the other railroads, the B&LE was not guilty of anticompetitive conduct.

In re Lower Lake Erie, 759 F.Supp. at 234. The Third Circuit "agree[d] with the district court that B&LE had a reasonable expectation that it would not be liable to the plaintiffs." *In re Lower Lake Erie,* 998 F.2d at 1181. This finding reflected that some of the evidence in the MDL 587 record supported B&LE's contentions that it was not guilty of the conspiracy or otherwise withdrew from it prior to the four-year statute of limitations period by reserving the right to take independent action. In addition, the railroads' motives "to preserve the status quo" and "justify their continued capital investment" in the existing systems can support an intent which was not coextensive with a desire to harm the MDL 587 plaintiffs, particularly in light of the fact that the Sherman Act's prohibition against restraints of trade is designed to protect competition, not specific competitors. Based on these general premises plaintiffs argue that "the MDL 587 record demonstrates only that B&LE believed, in good faith, that the 'restraint of trade' and 'monopolization' of the market in which it participated was a permissible restraint of *competition* in the iron ore transportation market" and under such circumstances B&LE did not have any intent to cause legal injury to anyone. Plaintiffs' Brief in Opposition (Document No. 483) at p. 36.

The requirement that the loss arise from an occurrence cannot be demonstrated for two reasons. First, the MDL 587 record establishes a presumption of B&LE's intent to cause the same general type of harm which gave rise to the liability and recoveries and plaintiffs have failed to produce sufficient evidence to overcome that presumption. In addition, permitting plaintiffs to shift their loss to defendants would offend Pennsylvania's public policy.

The issue of whether B&LE had the specific intent to violate the antitrust laws misses the point. The question is whether B&LE intended to produce the same general type of harm which caused the resulting injuries. The jury's verdict and applicable law demonstrate that it did.

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. §1. To sustain a cause of action under §1, the plaintiff must prove: "(1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy." *Tunis Bros. Co., Inc. v. Ford Motor Co.,* 952 F.2d 715, 722 (3d Cir. 1991), *cert. denied,* 505 U.S. 1221 (1992) (*quoting Martin B. Glauser Dodge Co. v. Chrysler Corp.,* 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978)). "The very essence of a section 1 claim, of course, is the existence of an agreement" and liability is predicated on the actors' concerted action. *Alvord-Polk, Inc. v. F. Schumacher & Co.,* 37 F.3d 996, 999 (ed Cir. 1994), *cert. denied,* 514 U.S. 1063 (1995). The antitrust plaintiff must prove that the defendant "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 761 (1984) (*quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.,* 637 F.2d 105, 111 (3d Cir. 1980) (Aldisert, J.)), *cert. denied,* 451 U.S. 911 (1981); *see also Alvord-Polk,* 37 F.3d at 1001.

Section 2 of the Sherman Act provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a felony. . . .

15 U.S.C. §2. "The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1991) (*quoting United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). "Monopoly power consists of the ability to control prices or exclude competition from the relevant market." *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 154 (3d Cir. 1981) (*citing Grinnell,* 384 U.S. at 571)); *see also United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). Establishing the defendant's "specific intent to monopolize the relevant market is a necessary element of conspiracy to monopolize." *Fleer Corp.*, 658 F.2d at 154 (*citing Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626 (1953)); *see also Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 807 (3d Cir. 1984) ("specific intent is an element of a conspiracy to monopolize").

The MDL 587 jury necessarily found each of these elements, including B&LE's conscious commitment to advance various facets of the scheme designed to exclude potential low-cost competitors and an intent to monopolize the relevant market through non-rate related illegal

activity. Judge Fullam instructed the jury on several key points which reflect these issues:

> A conspiracy is an agreement or understanding between two or more people to do an unlawful act, to do something which the law prohibits;
>
> That the plaintiffs had to show there actually was an agreement or mutual understanding to restrain trade in the particular market;
>
> In order to become a member of the conspiracy, knowing participation must be shown;
>
> In order for B&LE to be held liable under either §1 or §2 of the Sherman Act, B&LE had knowingly and voluntarily and intentionally become a party to the agreement or mutual understanding to restrain trade;
>
> B&LE could not be held liable by mere knowledge of or association with railroads which B&LE knew were doing something illegal;
>
> And B&LE had to have committed at least some of the acts in furtherance of the conspiracy within the statute of limitations period and without a good faith belief that it was carrying out the policies of the ICC or otherwise entertaining a good-faith belief that it was acting within the scope of its ICA immunity.

See Charge of the Court at pp. 8-50, Defendants' Appendix at pp. 119-161. In clarification Judge Fullam explained:

> In order to become liable for a conspiracy to violate the antitrust laws, it must be shown that the *defendant knowingly and intentionally became a member* of the conspiracy. It is not necessary that each act taken by the defendant that the defendant must know that it violated the antitrust laws. What it must show, however, is it knowingly participated in the act with knowledge that it would take place to the extent of its own actions and *it must know that its conduct would have the effect of restraining trade.*
>
> * * *
>
> But if the railroad [ultimately] reached a decision to carry out that agreement, they would be liable for the antitrust violation, even though the person who initially discussed it may not have been fully aware of the implications of the antitrust laws. *It must be shown that they acted knowingly with knowledge of the object to be achieved.* And whether they knew that object was illegal or not is not the key issue.

Id. at 73-74 (emphasis added), Defendants' Appendix 184-85. Through specific interrogatories the liability jury determined that B&LE knowingly participated in a conspiracy to restrain trade in violation of Section 1 of the Sherman Act and to monopolize in violation of Section 2 of the Sherman Act; B&LE committed acts in furtherance of the conspiracy without a good-faith belief that its acts were required by ICC regulation or its conduct was reasonably justified under the regulatory policies which governed B&LE's operations. *See* Questions to be Answered by the Jury 1, 2, 19 & 20, Defendants' Appendix at 99 & 111.

Moreover, plaintiffs' reliance on Judge Fullam's ruling in denying prejudgment interest under the Ohio Valenteen Act is unavailing. The liability against B&LE could not have been established unless it became a knowing participant in a conspiracy which had the objectives of restraining trade and maintaining a monopoly over the inland transportation of ore. In a contested setting the jury specifically was requested to pass on B&LE's contentions that it had a good faith and reasonable basis for believing that its conduct was "consistent with the overall policies of the ICC and, therefore is not to be punished and not in violation of the antitrust laws," Charge of the Court at 48, Defendants' Appendix at 159, and the jury found that specific acts by B&LE taken in furtherance of the conspiracy were done without a good-faith belief or a reasonable basis to believe they were protected by the regulatory climate in which B&LE operated. Judge Fullam explained:

> Literally thousands of documents, from the railroads' own files, establish beyond dispute the existence of an illegal conspiracy, dating back to at least 1950, to prevent self-unloading vessels, private docks, and trucking firms from gaining a foothold in the transportation of ex-lake iron ore. The record is so clear and complete, in fact, that it can be read to suggest that the participants may have genuinely believed that the antitrust laws did not apply to railroads at all. In part because of this phenomenon, over plaintiffs' objections at trial, I submitted to the jury the issue of whether *the defendant* may have been acting in the good-faith belief that it was merely carrying out policies approved or encouraged by the ICC. The

> jury rejected this "regulatory climate" contention, however, hence that issue need not be considered further.

In re Lower Lake Erie, 759 F.Supp. at 225 (emphasis added). It was thus clear that the court believed that although good faith is not ordinarily an antitrust defense, the regulatory landscape in which B&LE operated made it a potential one in MDL 587. The Third Circuit observed:

> The district court also instructed the jury concerning B&LE's good faith and regulatory climate defenses and informed the jury that, if the company's conduct was consistent with the overall policies of the ICC, it was not in violation of the antitrust laws.

In re Lower Lake Erie, 998 F.2d at 1160-61. The court specifically held that the instructions on the good-faith and regulatory climate defenses were accurate and properly informed the jury on the scope of *Keogh.* In light of the jury's findings the court rejected B&LE's argument that its conduct of record necessarily had to be limited to the immunity accorded to the railroads' rate-making activities, concluding that *Keogh* did not give the railroads "cart blanche to preclude competition." Thus, the issues of whether B&LE entertained a good-faith belief that its actions were not in furtherance of a conspiracy to restrain trade and maintain a monopoly and/or whether it believed its actions were reasonable and consistent with the overall policies of the ICC may not now be set aside as wrong.

By necessity then, B&LE became a knowing participant in a conspiracy which it understood had the goals of restraining trade and monopolizing inland transportation of ore and it committed knowing and willful acts in furtherance of those goals. The only logical conclusion which

can be drawn is that B&LE understood what it was doing, knew that the exclusion of the low-cost competitors from the market was the object of the agreement, became a participant in that agreement and affirmatively sought to further those illegal goals without a good-faith or reasonable belief that it had justification for doing so. Under these circumstances, an understanding by the actor that the potential low-cost competitors would be deprived of opportunities to compete and would be deprived of the economic benefits that any such competition would create is a virtual certainty. It follows that B&LE intended to cause the same general type of injury which harmed the MDL 587 plaintiffs.

Moreover, shifting the loss from B&LE's knowing and willful participation in a conspiracy to restrain trade and maintain a monopoly over a market of commerce precisely is the type of pernicious mischief which Pennsylvania public policy prohibits being shifted to an insurer. Agreements or practices which facially demonstrate a "pernicious effect on competition and lack any redeeming virtue" whatsoever qualify for special treatment under the Sherman Act and "are conclusively presumed to be . . . illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific R. Co. v. United States,* 356 U.S. 1, 5 (1958). Agreements or practices which raise such concerns and demand heightened scrutiny include price-fixing schemes, group boycotts and division of markets. *Id. See also Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,* 472 U.S. 284, 294 (1985) (discussing horizontal group boycotts which are illegal *per se*); *Malley-Duff & Assocs. v. Crown Life Ins. Co.,* 734 F.2d 133, 140 (3d Cir. 1984) (group boycott with purpose to exclude

competitors from the market is illegal *per se*). B&LE was found guilty of a criminal conspiracy in violation of Sections 1 and 2 of the Sherman Act and "the same conspiratorial conduct described in the criminal indictment [became] the subject of [the civil antitrust suit]." *In re Lower Lake Erie,* 998 F.2d at 1162 n.7. B&LE's *nolo contendere* plea to the criminal indictment established that it had knowingly and willfully become a participant in an agreement outside its ICA immunity, the purpose of which "was to ward off the outside competition heralded by the advent of the self-unloaders" and to use the collective power of the railroads to blackball competitors. *United States v. Bessemer & Lake Erie R. Co.,* 717 F.2d at 601-02. The goals of the criminal agreement were to eliminate competition from private docks, to eliminate competition among themselves without seeking or obtaining ICC approval and to eliminate competition from trucks in the transportation of ore. *Id.* at 596-97. B&LE's plea established the illegal conspiracy existed, B&LE knowingly joined it, B&LE joined it with the intent to restrain competition unreasonably and the conspiracy concerned goods or services in interstate commerce. *See United States v. United States Gypsum Co.,* 438 U.S. 422 (1978); *United States v. Container Corp.,* 939 U.S. 33 (1969); *see also* 3 Sand, et al., *Modern Federal Jury Instruction* at Instruction Criminal 58-44 (1999).

"Where an insured is alleged to have willfully or negligently violated the law, knowing it will obtain financial gain therefrom at another's expense, the insured may not, as a matter of public policy, contractually exempt itself from responsibility for its actions." *Enron,* 47 F.Supp.2d at 1166; *accord Central Dauphin School District,* 426 A.2d at 96; *BLaST,* 674 A.2d at 690. The conspiracy

was designed to distort the natural forces of the market by precluding the entry of low-cost competitors. This distortion permitted B&LE and the other railroads to maintain an illegal monopoly and continue to enjoy inflated market profits from the steel companies' lost savings and investment opportunities and the private dock and trucking companies' lost abilities to compete. The jury's damage awards necessarily reflected gains and profits from the railroads' services during this period which would have gone to others had the conspiracy not usurped the MDL 587 plaintiffs' opportunities and potential benefits. The MDL 587 judgments against B&LE reflected offsets for the settlements of the other conspirators. Under these circumstances permitting B&LE to shift the loss would have the potential to permit it to retain revenue it gained through the knowing and willful violation of a criminal statute. It also could potentially encourage others to engage in unlawful activity for the purpose of reaping benefits from such activity with the belief that any repercussions may well be minimized through insurance. Pennsylvania's public policy prohibits the shifting of such non-fortuitous losses under such circumstances.

Summary judgment is appropriate where, as here, the entire record demonstrates that no material issues of fact remain for trial and the movant is entitled to judgment as a matter of law. The material facts which control the court's disposition either are uncontested, established by the prior litigation, or presumptively established and challenged with merely colorable evidence and conclusory allegations and arguments. As the above makes clear, the MDL 587 losses do not fall within the scope of the Insuring Agreement and, even assuming that they did, public policy bars the plaintiffs' attempts to shift the loss to defendants

under the specific circumstances which gave rise to the MDL 587 liability. Accordingly, defendants' motion for summary judgment will be granted and plaintiffs' will be denied.[23]

/s/ Gustave Diamond
Gustave Diamond
United States District Judge

Date: March 22, 2000

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[23] Because defendants are entitled to summary judgment for the reasons set forth above, we do not reach their remaining arguments raising, *inter alia,* the defenses of prejudice by late notice as a matter of law and other public policy grounds as a bar to recovery.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

USX CORPORATION and BESSEMER AND LAKE ERIE RAILROAD COMPANY,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 95-866
ADRIATIC INSURANCE COMPANY, et al.,	)	
Defendants,	)	
v.	)	
ICAROM, Formerly known as INSURANCE CORPORATION OF IRELAND,	)	
Additional Defendant.	)	

ORDER OF COURT

AND NOW, this 22nd day of March, 2000, for the reasons set forth in the opinion filed this day, IT IS ORDERED that defendants' and additional defendant's motion for summary judgment (Document No. 455) be, and the same hereby is, granted; and,

IT FURTHER IS ORDERED that plaintiffs' motion for partial summary judgment (Document No. 449), be, and the same hereby is, denied.

Accordingly, IT IS ORDERED that judgment be, and the same hereby is, entered in favor of the defendants and

the additional defendant and against the plaintiff on all claims in this suit.

/s/ Gustave Diamond
Gustave Diamond
United States District Judge

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Plaintiffs,	)	
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ADRIATIC INSURANCE COMPANY, et al.,	)	
Defendants,	)	
v.	)	
ICAROM, Formerly known as INSURANCE CORPORATION OF IRELAND,	)	
Additional Defendants.	)	

ORDER OF COURT

AND NOW, this 11th day of September, 2002, for the reasons set forth in the opinion filed this day, IT IS ORDERED that plaintiffs' renewed motion to remand (Document No. 521) be, and the same hereby is, denied.

/s/ Gustave Diamond
Gustave Diamond
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

USX CORPORATION and BESSEMER AND LAKE ERIE RAILROAD COMPANY,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 95-866
ADRIATIC INSURANCE COMPANY, et al.,	)	
Defendants.	)	
v.	)	
ICAROM, Formerly known as INSURANCE CORPORATION OF IRELAND,	)	
Additional Defendants.	)	

OPINION

DIAMOND, D.J.

Presently before the court is plaintiffs' renewed motion to remand this action to the Court of Common Pleas of Allegheny County, Pennsylvania. The motion was filed in accordance with a limited order of remand entered by the United States Court of Appeals for the Third Circuit on May 1, 2001, reversing this court's order of April 1, 1996, only insofar as it denied plaintiffs' motion for leave to engage in discovery on subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1602 *et seq.* ("FSIA"). The discovery initially

sought and subsequently conducted by plaintiffs specifically was focused on whether "Icarom plc," formerly known as the Insurance Corporation of Ireland, qualifies as a "foreign state" within the meaning of the FSIA. The fully developed record establishes the accuracy of all material jurisdictional facts previously found by this court. It also establishes Icarom's unqualified right to foreign state status under the FSIA. Accordingly, plaintiffs' renewed motion to remand must be denied.

The central issue before the court is whether the ownership of Icarom on the date of removal entitled it to invoke FSIA jurisdiction as an "agency or instrumentality" of a foreign state as defined in 28 U.S.C. §1603(b)(2). Section 1441(d) of Title 28, U.S.C., authorizes the removal of "[a]ny civil action brought in State courts against a foreign state as defined in section 1603(a) of [Title 28]." The referenced section in the FSIA provides:

For the purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. §1603(a) & (b). On the record as now developed Icarom's foreign state status under this section is unequivocal and clear.

The relevant historical facts leading to the creation of Icarom and the Republic of Ireland's dominion and control over it are well established in the current record. The Insurance Corporation of Ireland ("ICI") originally was organized under Irish corporate law in 1935. ICI provided insurance services and products in all sectors of the Irish insurance market except for life insurance, and occupied prominent status in the market by the 1970's. *See* Plaintiffs' Statement of Undisputed Facts (Document 522) ("Plaintiffs' Statement") at ¶¶1, 3 & 4; Defendants' Joint Statement of Undisputed Facts (Document 531) ("Defendants' Joint Statement") at ¶.[1] In the 1970's ICI expanded its operations into foreign markets, including the London insurance market. Defendants' Joint Statement at ¶1. By that time ICI also had become the largest liability and marine insurer in Ireland and was active in a variety of insurance lines, including employers liability, public liability, marine, aviation, transit and automobile, and industrial and commercial. *Id.* By the early 1980's ICI had

[1] In referencing the paragraphs of the parties' joint statements the court credits the evidence of record cited by the parties in support of the paragraphs to the extent it supports the court's finding. Reference to a particular paragraph is not intended to signify the adoption of any additional statement or characterization made by a party in a paragraph or advanced in the evidence of record cited to support it.

expanded into a number of other outside markets and had established offices in the United Kingdom, the United States, France, Canada and Australia. *Id.* Plaintiffs' Statement at ¶4. In the late 1970's and early 1980's a substantial portion of ICI's foreign business was generated through its participation in the London insurance market. Defendants' Joint Statement at ¶2. That participation resulted in Icarom's subscription to at least six umbrella liability policies issued to plaintiffs from 1979 through 1982. Plaintiffs' Statement at ¶6; Defendants' Joint Statement at ¶4.

In 1981, Allied Irish Banks ("AIB"), an international financial corporation organized as a public limited company under Irish law and headquartered in Dublin, Ireland, acquired 25% of ICI's stock. In 1983, AIB acquired full control of ICI by purchasing all of its stock. Plaintiffs' Statement at ¶¶7-9; Defendants' Joint Statement at ¶5. AIB subsequently learned that ICI was in poor financial condition and would require substantial infusion of capital in order to meet its future obligations. Defendants' Joint Statement at ¶6; Plaintiffs' Statement at ¶10. In December of 1984, AIB committed to contributing substantial capital to ICI in order to ensure that it would have adequate reserves from which to pay claims. Defendants' Joint Statement at ¶7. New auditors were appointed, a detailed review of ICI's finances was undertaken and by the early months of 1985 it came clear that ICI was insolvent. Defendants' Joint Statement at ¶8; Plaintiffs' Statement at ¶10. ICI's participation in the London insurance market was identified as the primary cause for ICI's inability to meet the requirements for solvency prescribed by Irish law. Plaintiffs' Statement at ¶10.

The discovery of ICI's dire financial condition was disclosed by AIB to the Irish government and ICI's board in February and early March of 1985. After learning the true state of ICI's financial affairs, ICI's board provided formal notification to the minister of industry, trade, commerce and tourism ("the minister") and requested the minister to petition Ireland's High Court for the appointment of an administrator pursuant to the Insurance Act of 1983. Defendants' Joint Statement at ¶8; Plaintiffs' Statement at ¶12.

ICI's insolvency and potential collapse was viewed by the Irish government as a significant crisis due to the impact it could have on Ireland's banking and insurance industries, and in turn, the Irish national economy, and as a result the Irish government took immediate steps to acquire ownership of ICI and assist AIB in separating itself from its failing subsidiary. Plaintiffs' Statement at ¶¶13-20; Defendants' Joint Statement at ¶¶9-12. Steps were taken to transfer quickly AIB's ownership interest in ICI to a "shelf corporation" known as Gebhard Limited, an entity created by an Irish law firm who was assisting the Irish government in the acquisition of ICI. Defendants' Joint Statement at ¶14; Plaintiffs' Statement at ¶15.

On March 15, 1985, AIB and Gebhard Limited entered into an agreement whereby Gebhard Limited acquired all outstanding shares of ICI. Plaintiffs' Statement at ¶14. The agreement was subject to approval by the minister. Defendants' Joint Statement at ¶13. On that date Gebhard Limited was wholly owned and controlled by two nominees of the Irish government, who had agreed to hold the shares of Gebhard Limited in trust for the minister. Defendants' Joint Statement at ¶15; Plaintiffs' Statement at ¶16. These two employees were Irish civil

servants who worked for the Department of Industry, Trade, Commerce and Tourism. *Id.* On March 20, 1985, the Irish government changed Gebhard Limited's name to Sealuchais Arachais Teoranta ("SAT"). Defendants' Joint Statement at ¶16; Plaintiffs' Statement at ¶17.

On March 15, 1995, the same day the Irish government acquired ICI through the transfer of its shares to Gebhard Limited, the minister filed a petition with the Irish High Court to place ICI under administration pursuant to Ireland's Insurance Act of 1983. Defendants' Joint Statement at ¶19; Plaintiffs' Statement at ¶30.[2] Pursuant to the petition the minister nominated and the High Court appointed William McCann, a partner of the accounting firm of Gregg, Gardner & Company, as ICI's provisional administrator. His appointment was made permanent by the High Court on March 25, 1995. Defendants' Joint Statement at ¶19; Plaintiffs' Statement at ¶32.[3]

On April 8, 1985, the Parliament of Ireland passed the Insurance Act of 1985. Defendants' Joint Statement at ¶22; Plaintiffs' Statement at ¶19. The 1985 Act was promulgated in order to authorize retroactively the Irish government's acquisition of SAT (originally known as

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[2] Ireland's Insurance Act of 1983 authorizes a process applicable to Irish insurance companies that is similar to bankruptcy proceedings in the United States. Plaintiffs' Statement at ¶¶23-25. To date only ICI/Icarom and one other insurance company have been placed into administration under the Act.

[3] Mr. McCann served as ICI's (and later Icarom's) administrator until he retired on November 20, 1995. Defendants' Joint Statement at ¶19. At that point the minister nominated and the High Court appointed Donal O'Connor, who had assisted Mr. McCann with the administration of ICI (and later Icarom) since 1985.

Gebhard Limited), effective as of March 15, 1995, the date SAT acquired the shares of ICI. Defendants' Joint Statement at ¶¶23-24; Plaintiffs' Statement at ¶19.

The 1985 Act authorized the minister to hold the shares of SAT as he or she sees fit, and if the minister sells the shares, then the proceeds are to be paid to the Exchequer of Ireland. Defendants' Joint Statement at ¶26. The Act further authorizes the minister, after consultation with the minister of finance, to appoint the directors of SAT, and the directors are to hold their office on the terms and the conditions determined by the minister. Defendants' Joint Statement at ¶27. The directors may be removed by the minister at any time. The Act further authorized the minister to guarantee payment by ICI under certain insurance policies issued in the London market and required the minister to report to Parliament concerning the payments made pursuant to the guarantee. *Id.*

Under Irish law a company that is a public limited company ("plc") is required to have at least seven shareholders. In order to comply with this aspect of Irish law, the Irish government arranged for legal title to six of ICI's 120 million common shares to be vested in civil servants who hold those shares in trust for the minister. The remaining 119, 999, 994 common shares and the 20 million preferred shares were transferred to SAT. Defendants' Joint Statement at ¶18; Plaintiffs' Statement at ¶18.

Under Irish law a company that is not a plc must have at least two shareholders. Defendants' Joint Statement at ¶18. The two sole shares of SAT are held by two high-ranking Irish civil servants, who hold the shares in trust for the minister. Defendants' Joint Statement at ¶18;

Plaintiffs' Statement at ¶18. The minister has never acquired direct legal title to the shares of SAT, notwithstanding that the 1985 Act provided the minister with authorization to acquire and hold the shares as he or she sees fit. Plaintiffs' Statement at ¶20.

The domestic portion of ICI's insurance business, which had continued to operate as an ongoing concern after ICI was placed under administration in 1985, was sold in 1990, along with the Insurance Corporation of Ireland trade name and the good will accompanying that portion of the company's operations. Defendants' Joint Statement at ¶¶29-36; Plaintiffs' Statement at ¶¶57-64. ICI's administrator initially sought and obtained approval from the Irish government to determine whether there was a market for the sale of ICI's domestic insurance business. Defendants' Joint Statement at ¶29. After receiving authorization to search for potential purchasers, a competitive process was employed to generate tender offers from outside companies. *Id.* When the field was reduced to two competitors, the administrator went through an active process with those parties and the government. The administrator gave a formal recommendation to the government through the departments, which in turn forwarded the recommendation to the cabinet of the Irish government. Defendants' Joint Statement at ¶¶29-30. The cabinet of the Irish government, e.g., the Irish government's most senior ministers, voted on and approved the proposal to sell ICI's trade name and its ongoing domestic insurance operations ("the Irish Business") to an entity known as Orkandale Holdings Ltd., a subsidiary of Assurance Generales de France ("AGF"). Defendants' Joint Statement at ¶31. The decision to sell ICI's Irish Business was undertaken in order to lessen the additional

funding that ICI likely would require from the government in an ongoing manner. Defendants' Joint Statement at ¶32.

At the time the sale of the Irish Business was being explored, the assumed liabilities relating to the Irish Business exceeded the value of its assets. Plaintiffs' Statement at ¶57. In order to maximize the value of ICI's Irish Business and to minimize the impact the sale would have on ICI's resources, the sale was structured in a manner designed to permit AGF to take advantage of IR£ 150 million of substantial tax losses that had accrued to ICI. Defendants' Joint Statement at ¶33. Notwithstanding the transfer of these tax losses, ICI was required to pay IR£ 18 million to AGF at closing. Plaintiffs' Statement at ¶57.

Under Irish law, the tax losses would remain with the Irish business only if all of the ownership in ICI was transferred to Orkandale for a period of time. *Id.* Accordingly, the transaction was structured so that all ownership in ICI would be transferred to Orkandale. Orkandale would then transfer the ICI trade name and the Irish Business to its subsidiary, Arkwright Limited ("Arkwright"). After the Irish Business and ICI trade name were transferred to Arkwright, ICI's name would be changed to Icarom. *Id.* The sales agreement contained a "put option" to the buyer, Orkandale, that gave it the unqualified right to transfer the shares of ICI (which by then would become known as Icarom) back to SAT. Defendants' Joint Statement at ¶35; Plaintiffs' Statement at ¶60.

The administrator of ICI filed a petition with the High Court for approval of the sale and described the transaction in an accompanying affidavit. Plaintiffs' Statement at

¶59. The government's approval through the cabinet of the Irish government was memorialized in a letter dated February 14, 1990. Defendants' Joint Statement at ¶31. That approval endorsed the administrator's proposal to sell ICI's trade name and its Irish Business to Orkandale. *Id.*

After receiving approval from the High Court and the Irish government to carry out the transaction, in May of 1990, SAT and the six civil servants transferred all of ICI's shares to Orkandale, which effectively transferred the IR£ 82 million in liabilities associated with the Irish Business and the trading name "Insurance Corporation of Ireland." Defendants' Joint Statement at ¶34; Plaintiffs' Statement at ¶58. IR£ 25 million also was transferred to AGF to fund the capitalization of the new company being created to operate the Irish Business. Defendants' Joint Statement at ¶34. Orkandale then transferred the ICI trade name and the Irish Business to its subsidiary, Arkwright, and ICI's name was changed to Icarom. Defendants' Joint Statement at ¶34. In August of 1990, AGF and it subsidiary Orkandale exercised the "put option" of the agreement and transferred the shares of ICI, now known as Icarom, back to SAT. Specifically, Orkandale transferred to SAT 119,999,994 of Icarom's common shares and its 20 million preferred shares, and the remaining six common shares were transferred to the six civil servants, with all shares being held in trust for the minister (by then known as the minister of the Department of Enterprise, Trade and Employment). Defendants' Joint Statement at ¶¶8 n.1 & 35; Plaintiffs' Statement at ¶61.

Since Orkandale exercised the put option on August 15, 1990, reverting the ownership of Icarom back to SAT,

Icarom has been operated solely as a "runoff company." Defendants' Joint Statement at ¶36; Plaintiffs' Statement at ¶62. It has not engaged in any underwriting since the 1990 transaction and has been in business solely to wind up its remaining liabilities. *Id.* The discharge of its liabilities through runoff is not expected to be complete until 2040 or 2050. Defendants' Joint Statement at ¶36.

The structure of Icarom's ownership following the 1990 transaction was and continues to be the same as ICI's was between March 15, 1985, and the 1990 transaction. Defendants' Joint Statement at ¶37. That is, all but six of Icarom's 20 million common shares and all its 20 million preferred shares are held by SAT, non-trading holding company. The two shares of SAT are held in trust for the minister by two high-ranking civil servants who are employed in the insurance section of the Department of Enterprise, Trade and Employment. Defendants' Joint Statement at ¶¶37-38. The remaining six shares of Icarom's stock are held by six Irish civil servants in trust for the minister. *Id.*

Through the Department of Enterprise, Trade and Employment and the Department of Finance, the government of Ireland has exercised ongoing dominion and control over ICI and Icarom. Defendants' Joint Statement at ¶44. The administrator appointed by the High Court to manage the day-to-day affairs of ICI/Icarom regularly consults with the Department of Enterprise, Trade and Employment on all significant matters. *Id.* All major decisions are made with the department's approval. The administrator delivers a formal presentation to the Department of Enterprise, Trade and Employment and the Department of Finance on the status of Icarom's operations and makes recommendations for future action on a

yearly basis. *Id.* In addition, the administrator authors quarterly reports which are forwarded, to the same departments. *Id.* The Department of Enterprise, Trade and Employment, in conjunction with the Department of Finance, require this regular contact and reporting from the administrator in order to be able to account for ICI/Icarom's affairs in the Irish Parliament as its representative owner. Defendants' Joint Statement at ¶45. The ministers of the departments have exercised a controlling role in all major decisions affecting ICI/Icarom since it was placed in administration in 1985. *Id.*

The Department of Enterprise, Trade and Employment also has exercised control over the selection of key personnel working for Icarom. Defendants' Joint Statement at ¶48. Icarom has three full-time employees. *Id.* Icarom's current general manager was appointed by the administrator following approval from the department. *Id.* Icarom's current administrator, Donal O'Connor, was appointed by the High Court only after both departments supported his nomination following a competitive evaluation process. *Id.*

Funding for ICI and Icarom's ongoing operations and payment of liabilities has been arranged and monitored by the Irish government. Defendant's Joint Statement at ¶¶50-63; Plaintiffs' Statement at ¶¶39-56. All funding has been funneled through the insurance compensation fund ("ICF"), which was created by the Insurance Act of 1983 specifically for the purpose of administering an insolvent insurance company as a going concern. Defendants' Joint Statement at ¶50; Plaintiffs' Statement at ¶39. All funds paid into the ICF for ICI/Icarom have been marshaled by the Department of Finance and loaned to the ICF for distribution to ICI/Icarom. Plaintiffs' Statement at ¶45.

Initially, the Department of Finance and the Irish Central Bank entered into an agreement to provide funding for ICI. Plaintiffs' Statement at ¶46; Defendants' Joint Statement at ¶53. Through this arrangement the minister of finance paid IRE 100 million into the ICF for disbursement to ICI. Defendants' Joint Statement at ¶53. In a separate agreement between Ireland's Central Bank and AIB, AIB agreed to make a loan in the amount of IR£ 70 million to the government, which was used to fund that portion of the government's IR£ 100 million advance to the ICF. The remaining IR£ 30 million was provided directly by the Irish government. *Id.* AIB and other banks in Ireland agreed to pay the interest costs being incurred on the IR£ 30 million portion of the loan extended by the Exchequer. Defendants' Joint Statement at ¶53; Plaintiffs' Statement at ¶46.[4]

Through the 1985 financing arrangement AIB and other banks agreed to pay a set amount to cover the interest on the government's IR£ 30 million portion of the loan. Defendants' Joint Statement at ¶55. If the interest rate on that portion were to become lower than the bank's obligation under the 1985 agreement, then the excess was to be deposited into the ICF and the government was permitted to keep it. Interest rates in fact fell, and the government received excess money from the interest rate provisions of the 1985 agreement. *Id.* Rather than keeping

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[4] Plaintiffs' statement refers to the government's portion of the loan as resources from the "Central Bank." It is clear that the portion of the loan extended by the "Central Bank" and the portion extended by the "Exchequer" are the same and refer to direct funding by the Irish government. *See* Defendants' Joint Statement at ¶¶53-54; Plaintiffs' Statement at ¶46.

the money, the government used it to further fund ICI's ongoing operations. *Id.*

The 1985 loan to ICF for the benefit of ICI called for repayment in 15 years. Defendants' Joint Statement at ¶53; Plaintiffs' Statement at ¶46. When the loan came due in September of 2000, Icarom lacked sufficient funds in Irish pounds to pay the debt. Defendants' Joint Statement at ¶61. The Irish government refused to permit Icarom to borrow additional funds in Irish pounds to pay the loan and instead required it to convert funds held in U.S. dollars, notwithstanding the fact that the proposed additional borrowing might have been cheaper in the long run. *Id.* Icarom accordingly converted funds held in U.S. dollars and repaid its 1985 obligation on time. Defendants' Joint Statement at ¶¶61-62; Plaintiffs' Statement at ¶48.

In addition to the funding obtained through the 1985 financing agreement and the Irish government's remittance of the excess interest under that agreement, the Irish government has arranged for other forms of financing. On December 9, 1992, an additional agreement was entered between AIB, the minister of France, and the Central Bank of Ireland which obligated AIB to make an additional payment to the ICF for the benefit of Icarom in the amount of IR£ 8.8 million per year for 20 years. In exchange, the Exchequer agreed to a one time advance of IR£ 32 million, effectuated through a non-interest bearing loan to the ICF for disbursement to Icarom. Plaintiffs' Statement at ¶51; Defendants' Joint Statement at ¶¶57-58. The Irish government's portion of the loan was interest free, which relieved Icarom from having to pay approximately IR£ 2.1 million in annual interest. Defendants' Joint Statement at ¶58; Plaintiffs' Statement at ¶52. Under the current administration it is projected that

Icarom will be able to repay the loan on time in 2012. Thus, beyond the potential risk accompanying the loan, the only cost to the Republic of Ireland will be the value of the interest foregone on the Exchequer's IR£ 32 million loan. Plaintiffs' Statement at ¶52.

The Irish government also has arranged financing for ICI and Icarom through various commercial loans. Due to the precarious financial position of the companies, credit on common commercial terms has been unavailable. Plaintiffs' Statement at ¶53. In order to obtain loans from commercial lenders, the Irish government has been required to place its guarantee behind the loans. Defendants' Joint Statement at ¶59; Plaintiffs' Statement at ¶53. With the government's guarantee, loans from commercial lenders such as City Bank, AIB, and Markets and Manque Nationale de Paris have been obtained and channeled through the ICF to ICI and Icarom. Defendants' Joint Statement at ¶59; Plaintiffs' Statement at ¶53-54. As a result of these agreements IR£ 75 million was disbursed to Icarom through the ICF. Icarom repaid these loans under the individual agreements and as a result the government was never compelled to make good on its guarantees. Defendants' Joint Statement at ¶60; Plaintiffs' Statement at ¶55.

The financing of ICI and Icarom's ongoing liabilities has been accomplished only with substantial risks and costs to the Republic of Ireland. The government has borne substantial risk in providing or guaranteeing a number of loans for the benefit of ICI and Icarom. All significant financing has been arranged by the government of Ireland and approved by the High Court. Defendants' Joint Statement at ¶¶52, 59-60; Plaintiffs' Statement at 47. The government relinquished its right to IR£ 2.1 million in

excess interest under the 1985 finance agreement for the benefit of Icarom. Defendants' Joint Statement at ¶63. The government also lost the use of IR£ 2.1 million per year as a result of its IR£ 32 million interest-free 20-year loan provided to Icarom in 1992. As a result, the government has incurred approximately 9% – or IR£ 32 million –of the total IR£ 357 million required to fund Icarom through the time frame covered by the current financing arrangements.

Against the above backdrop plaintiffs argue that Icarom does not qualify as an "instrumentality of a foreign state" under the FSIA because the Irish government is not the legal owner of any shares of Icarom and purportedly enjoys no incidents of ownership thereto. Defendants contend that plaintiffs' position that Icarom does not enjoy foreign state status as an instrumentality of the Republic of Ireland disregards the pertinent facts, is wrong under the plain language of the statute and is at war with the FSIA's underlying purposes. We agree.

As previously noted, the jurisdiction of this court is controlled by whether the ownership of Icarom as it existed in 1995 satisfies the definition of a "foreign state" set forth in 28 U.S.C. §1603. In order to claim foreign state status as an "agency of instrumentality," an entity must establish three requirements. First, the entity must be a separate legal person under §1603(b)(1). Second, the entity cannot be a citizen of the United States or an entity created under the laws of a third country. 28 U.S.C. §1603(b)(3). Third, the entity must either be an organ of a foreign state or a political subdivision thereof or be an entity whose majority ownership interest is owned by a foreign state or political subdivision thereof. The parties agree that Icarom satisfies the first two requirements and

confine their arguments to the third requirement. The parties' dispute concerning Icarom's ability to satisfy §1602(b)(2) is premised on differing appellate court constructions of §1603.

Relying on a series of cases from the United States Court of Appeals for the Ninth Circuit, plaintiffs specifically argue that the only ownership "interest" the Irish government can claim in Icarom is through SAT, an intermediary company whose shares are owned by two civil servants. This tiered ownership "interest" of the Republic of Ireland in Icarom is said to be "tenuous and remote" and as a form of indirect ownership it purportedly falls short of demonstrating that a majority of Icarom's shares are owned by a foreign state, which plaintiffs assert is needed to make it in instrumentality of the Republic of Ireland within the meaning of 28 U.S.C. §1603(b).

Plaintiffs specifically rely on *EOTT Energy Operating Ltd. Partnership v. Winterthur Swiss Ins. Co.*, 257 F.3d 992 (9th Cir. 2001), to support the proposition that direct ownership of Icarom's stock by the Republic of Ireland is required to satisfy the definition of an "instrumentality of a foreign state" under §1603(b)(2). In *EOTT*, the court held that Icarom was not an instrumentality of a foreign state within the meaning of the FSIA. Relying on the circuit's prior precedent in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), *cert. denied*, 561 U.S. 869 (1995), and *Patrickson v. Dole Food Company, Inc.*, 251 F.3d 795 (9th Cir. 2001), *cert. granted*, 122 S.Ct. 2657 (2002), the panel in *EOTT* reiterated the prior holding in *Gates* that a majority-owned subsidiary of an instrumentality of the foreign state is not in itself an instrumentality of a foreign state under the FSIA. *EOTT*, 257 F.3d at 997. Under *Patrickson*, "[t]his includes corporations that are subsidiaries of

corporations that are owned by the foreign government." *Id.* Because Icarom is not directly owned by the Republic of Ireland but instead is held through SAT, the circuit's prior precedent mandated a holding that Icarom is not an instrumentality of a foreign state under §1603.

In *Gates*, the court held that a corporate subsidiary wholly owned by an instrumentality of a foreign state was not owned by "a foreign state or political subdivision thereof," but instead was owned by an instrumentality of a foreign state, thus placing it beyond the scope of the literal language in §1603. The court reasoned:

> One might argue that once we determine that [an entity] is an agency or instrumentality, then it *ipso facto* becomes a foreign state or political subdivision thereof. However, the literal language of the statute requires us to reject that argument. First, the statute provides that a foreign state *includes* an agency or instrumentality, not that it *is* an agency or instrumentality or that it *is defined as* an agency or instrumentality. Second, the remainder of the statute contradicts any interpretation that would equate "an agency or instrumentality" with "a foreign state." If Congress had intended "agencies or instrumentalities of a foreign state" to mean "a foreign state" for the purposes of section 1603, then it would have intended a "political subdivision" to mean "a foreign state" because section 1603(a) defines a foreign state as including both "a political subdivision of a foreign state or an agency of instrumentality of a foreign state." The statutory language strongly indicates that Congress did not intend this interpretation, however, because the remainder of the section differentiates

> between "foreign states" and "political subdivisions thereof."
>
> For example, section 1603(b)(2) provides that an entity must be "an organ of a foreign state *or political subdivision thereof*," or a majority of its shares must be owned by a "foreign state *or a political subdivision thereof.*"

Gates, 54 F.3d at 1462 (emphasis in original). Under this view any form of tiered ownership which places a corporate entity's direct ownership in an intermediary controlled by a foreign nation falls outside the jurisdiction of the FSIA.

Defendants correctly point out that plaintiffs' position is based upon the minority view and a majority of the courts considering the issue have recognized that a foreign nation's equitable or beneficial ownership interest of an entity is sufficient to satisfy the definitional requirements of the FSIA. Relying on the construction of the statute reflected in the United States Court of Appeals for the Seventh Circuit's decision in *In re Air Crash Disaster Near Roselawn Ind.*, 96 F.3d 932 (7th Cir. 1996) ("*Roselawn*"), and the United States Court of Appeals for the Fifth Circuit's decision in *Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001), they argue that the structure of Icarom's ownership satisfies the majority ownership test of §1603(b)(2). These courts, as well as no fewer than eleven district courts, have opined that the FSIA draws no distinction between direct and indirect ownership and as a result equitable or beneficial majority ownership through multi-tiered corporate structuring is not barred by the definitional requirements of §1603. Defendants alternatively argue that Icarom's

history in administration under Irish law demonstrates it is "an organ of a foreign state" in any event.

The court cannot subscribe to the construction of the statute employed in *Gates* and its progeny for several reasons. First, the record unequivocally demonstrates the Irish government has exercised and continues to exercise complete dominion and control over the ownership interests of Icarom. In 1985 the Irish Exchequer paid a nominal sum to AIB in order to acquire all of ICI's stock on behalf of the Irish government. The Irish government arranged for legal title of six of ICI's common shares to be issued to civil servants who are bound to hold the shares in trust for the minister and legal title to the remaining shares to be held through SAT; ownership in SAT in turn was and is vested in two high-ranking civil servants who hold that ownership in trust for the minister. By operation of statute, all dividends declared by SAT are to be paid directly into the Irish Exchequer. The dividends do not pass through the nominal shareholders. All payment by ICI and Icarom of advanced public funds are to be remitted directly into the Irish Exchequer. The Irish government has arranged for and guaranteed all commercial lines of credit extended to ICI and Icarom. The Irish government has borne all risk inherent in the public funding of ICI and Icarom, and has incurred substantial risk, a loss of revenue, and a loss of revenue-earning capacity as a result of its oversight and equitable ownership of ICI/Icarom. Any matter of significance beyond the day-to-day administration of running off Icarom's long-term liabilities requires approval from the Irish government and the Irish High Court. The disposal of any legal or equitable interest in Icarom can be accomplished only through the ultimate authority of these governmental bodies and the disposition

would inure only to the benefit of the Irish government. The civil servants deposed during the discovery in this case unequivocally indicate that "[t]he position of Ireland is that we own Icarom." *See* Deposition of Billie Hawks, principal officer in the Department of Enterprise, Trade and Employment, at Defendants' Appendix 370; *see also id.* at 398 & Defendants' Joint Statement at ¶¶42 & 43 (referencing the declaration of Donald O'Connor indicating "the Republic of Ireland owns Icarom through SAT" and the testimony of the current general manager of Icarom, Ronald Carroll, who indicated "Icarom is owned by the Irish government."). The United States Vice Consul in Ireland has authenticated a "Certificate of Ownership" prepared by the Department of Enterprise, Trade and Employment on behalf of the minister asserting ownership of Icarom by the Republic of Ireland. Defendants' Joint Statement at ¶39. It follows that no entity or individual other than the Irish government could exercise any form of dominion or control over the ownership rights of Icarom. Under these circumstances the suggestion that the Irish government's ownership of Icarom is tenuous and remote is at best a litigation construct without evidentiary support.

Moreover, the majority ownership requirement set forth in 1603(b)(2) does not mandate the manner in which an agency or instrumentality of a foreign nation must be owned. Numerous courts of appeals have so recognized. They likewise have recognized that an equitable or beneficial majority interest is within the ambit of the statute. These courts as well as a vast majority of the district courts addressing the matter have reached this conclusion based upon a combination of reasons stemming from the plain language of §1603, the legislative history of the

FSIA, and the public policies Congress sought to advance through the passage of the FSIA.

For example, in *Linton v. Airbus Industrie*, 30 F.3d 592 (5th Cir. 1994), the court noted its disagreement with the lower court's holding that a foreign state's tiered ownership interest of a corporate entity was insufficient to gain foreign state status under the FSIA. *Id.* at 598 n.29. The court explained:

> The controlling statute, however, erects no explicit bar to the method by which a foreign state may own an instrumentality, merely requiring that the *entity* claiming [foreign state status] – not its parent – have "a majority of [its] shares or other ownership's interest . . . owned by a foreign state or political subdivision thereof." 28 U.S.C. §1603(b)(2). There is no mention of "voting" or "control" majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving.

Id. (emphasis in original).

Similarly, the *Roselawn* court endorsed the lower court's construction of §1603 which recognized that "if a 'foreign state' as defined in section 1603(a) 'includes' an 'agency or instrumentality of a foreign state,' then a corporation that is majority owned by a 'foreign state' 'includes' a corporation majority owned by an 'agency or instrumentality of a foreign state.'" *Roselawn*, 96 F.3d at 940. After considering and rejecting the construction and reasoning employed in *Gates*, the court opined:

> Close analysis confirms the district court's resolution of the question of "tiering," The Act does not expressly require direct ownership, nor does

> it exclude the form [of multi-level corporate ownership] in which France and Italy hold ATR as an instrumentality. . . .
>
> Although France and Italy controlled ATR through intervening entities, the language and legislative history consistent with the language of the FSIA demonstrates that ATR is the type of corporation included within the statutory definition of "foreign state." Because ATR meets the FSIA's requirement of majority foreign state ownership, it properly removed these cases to federal court.

Id. at 941.

The court in *Delgado* reached the same conclusion:

> Plaintiffs insist, however, that indirect ownership is insufficient to qualify an entity for foreign state status. We disagree. Based on our reading of the statute, we discern nothing to support the proposition that indirect ownership of the requisite percentage precludes an entity from qualifying as a foreign state.
>
> The plain language of the statute simply requires "ownership" by a foreign state. It draws no distinction between direct and indirect ownership; neither does it expressly impose a requirement of direct ownership. Indeed, we have previously indicated that indirect ownership is sufficient to confer foreign state status [in *Linton v. Air Bus Industrie*]. . . . Should any doubt remain concerning this Circuit's position on tiering or indirect ownership, we squarely hold today that indirect or tiered majority ownership is sufficient to qualify an entity as a foreign state, assuming that all other requirements are met. In so doing, we join at least two other Circuits that

> have considered the issue and reached the same conclusion.

Delgado, 231 F.3d at 176 (*citing*, *inter alia*, *Roselawn*, *supra*, and *Gould, Inc. v. Pechinery Uqine Kuhlman*, 853 F.2d 445, 449-50 (6th Cir. 1988)).

As the above circuit court opinions have made clear, the notion that §1603(a) should be given a confined construction and application is at odds with the expansive language used in the statute and the legislative history underlying it. In passing the FISA Congress chose to define the term "foreign state" broadly. *Roselawn*, 96 F.3d at 936, 940. Congress expressly intended the phrase to include separately incorporated entities. *Id.* at 936. The House report accompanying the bill leading to the FSIA indicated:

> As a general matter entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transportation organization such as a shipping line or air line, a steel company, a central bank, an export association, a government procurement agency or a department or ministry which acts and is suable in its own name.

H.R.Rep. No. 94-1487, 94th Cong., 2d Sess., at 15-16 (*reprinted* at 1976 U.S.S.C.A.N. 6604, 6613). Defining "agency or instrumentality" in the manner set forth in §1603(b)(2) reflected an intent to provide FSIA jurisdiction over disputes involving more than "just foreign sovereigns" and "foreign government" as used in §1611(b)(1) of Title 28 of the United States Code. *Roselawn*, 96 F.3d at 937.

"Instead, Congress included within the Act corporations, a majority of whose . . . ownership interest is owned by foreign state or political subdivision thereof." *Id.* (*quoting* §1603(b)(2)). By employing the broader concept of "foreign state" Congress thus expressly attempted to accommodate the multiple forms of government ownership that could occur throughout the hundreds of existing nations.

The construction of the statute advocated by plaintiffs and adopted in *Gates* is based upon the premise that a reading of §1603 which permits tiering renders the phrase "or political subdivision thereof" in §1603(b)(2) superfluous, because under §1603(a), a political subdivision already is included in the definition of the phrase "foreign state." The courts that have endorsed this view have reasoned that recognizing tiered ownership considerably could expand FSIA coverage by permitting an "infinite looping" between §1603(a) and §1603(b)(2). But as a number of courts have noted in response, a construction that fails to recognize the jurisdictional entitlement of an entity whose shares are majority owned by an entity that is itself an agency or instrumentality of a foreign state would contradict or otherwise improperly limit the definition of "foreign state" in §1603(a). *See, e.g.*, *Parex Bank v. Russian Savings Bank*, 81 F.Supp.2d 506, 508 (S.D.N.Y. 2000) (The construction of §1603(b)(2) as prohibiting foreign state status under tiered ownership in an effort to avoid a "superfluity" appears to conflict with the definition of a "foreign state" used in §1603(a) and as a principle of statutory construction "an interpretation giving an outright contradiction is less consistent than one giving a superfluity . . . [and] [t]hus, a better reading of the plain language of §1603 would permit tiering."); *Lehman Bros. v. Minmetals International Non-Ferrous Metals Trading Co.*,

169 F.Supp.2d 186, 191 (S.D.N.Y. 2002) ("Given this broad definition and use of 'foreign state,' the additional inclusion of the phrase 'political subdivision thereof' along with 'foreign state' in section 1603(b) could be read as redundant [but] [a] narrower reading of that term, however, would flatly contradict its definition in section 1603(a)."). Other courts have noted that the *Gates* construction improperly limits the word "includes" as used in the definition of a "foreign state." *See Roselawn*, 96 F.3d at 940 ("'The use of 'includes' shows Congress' intent to broadly define a 'foreign state.'"); *Millicom International Cellular v. Republic of Costa Rica*, 995 F.Supp. 14, 18 n.5 (D.D.C. 1998) ("Therefore, consistent with the broad statutory language of Section 1603(a), an entity that is majority owned by a 'foreign state' 'includes' an entity majority owned by 'an agency or instrumentality of a foreign state.'"). Finally, at least one court has reasoned that acknowledging the expansive FSIA jurisdiction flowing from recognizing foreign state status through tiered ownership satisfies one of the very important goals of the FSIA: broad federal jurisdiction for matters affecting the interests of foreign nations. *See Parex Bank,* 81 F.Supp.2d at 508 ("Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.") (*quoting* H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605).

The plain language and internal structure of §1603 supports the view that indirect beneficial ownership through corporate tiering by a foreign nation is sufficient to establish jurisdiction under the FSIA. In addition, the

legislative history supports an inclusive and expansive reading of the term "foreign state." Consequently, a construction of the statute which recognizes that indirect beneficial majority ownership satisfies the requirements of §1603 reflects the appropriate resolution of the issue presented.

The construction of the FSIA advocated by plaintiffs and adopted in *Gates* also is at odds with the construction to be given to the FSIA in this jurisdiction. As previously noted in this court's March 29, 1996 opinion, the United States Court of Appeals for the Third Circuit in *In re Texas Eastern Transmission Corporation*, 15 F.3d 1230 (3d Cir. 1994), directed the district courts to employ "a liberal approach in implementing the FSIA's comprehensive jurisdictional scheme [because such an approach] is most conducive to the FSIA's paramount objectives of keeping federal courts open to foreign states and indeed of affirmatively encouraging private actions against foreign states to be adjudicated in federal court." *Id.* at 1241. In mandating the use of this approach the court of appeals emphasized that the "jealous restriction" that typically has characterized the application of the diversity statute is inapplicable to the FSIA. It opined:

> It is further evident that enactment of the FSIA was in response to unique policy considerations touching on the international relations of the United States, considerations not apropos to the federal diversity statute. Indeed, the Supreme Court has acknowledged Congress' deliberate intent to circumvent much of the potential for interference with the federal government's foreign relations caused by lack of uniformity and local bias in civil case law involving foreign states as defendants by channeling private actions against

> foreign sovereigns away from the state forums and into federal courts to be adjudicated in non-jury trials. . . . Thus, the FSIA establishes the federal district courts as the forum preferred by Congress for bringing suit against a foreign state, and the policy of "zealous restriction" which has characterized application of the diversity statute is not operative in the FSIA context. . . .

Id. at 1239 (citations omitted). Consistent with this liberal approach a number of other courts of appeals and district courts have recognized that the import of the broad language employed in the statute coupled with its purposes as reflected in the legislative history lead to the conclusion that Congress intended to provide federal jurisdiction for wholly owned entities that are held by instrumentalities of a foreign government through various "tiering" or "pooling" arrangements. *See Roselawn*, 96 F.3d at 937-41 (purpose of FSIA coupled with plain language of §1603(a) compels the conclusion that indirect ownership through "pooling" or "tiering" is consistent with congressional intent); *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d 115, 116-17 (2d Cir. 1984) (straightforward language of §1603 coupled with legislative history supports recognition that double-tiered administrative agency ownership fits comfortably within the phrase "political subdivision," which Congress intended to cover "all governmental units beneath the central government"); *Mousopole v. South African Airways, Ltd.*, 172 F.Supp.2d 443, 445-47 (S.D.N.Y. 2001) (expansive language in §1603(a), legislative history and purposes to be served by the FSIA mandate a reading of the statute that recognizes the sufficiency of a foreign government's indirect and beneficial ownership).

The importance of the statute's underlying purposes cannot be overlooked in deciding questions concerning its jurisdictional reach. For example, in *Mousopole* the court noted that while a "literalist approach" to interpreting the statute was less than conclusive, the important public policy considerations underlying the passage of the FSIA – including international comity and noninterference with the Executive Branch's foreign policy authority – support an interpretation that recognizes, at a minimum, that beneficial ownership of an entity by a foreign government rises to the level of "foreign state" status under §1603(a). The court opined:

> . . . One of the principal reasons for the broad grant of federal subject matter jurisdiction in the FSIA was to ensure, so far as possible, that a federal forum would be available where the interests of a foreign nation are involved in a manner which might effect the ability of the Executive Branch to conduct successful foreign policy. A niggardly construction of the provisions defining "foreign state" would render the Act inapplicable even where foreign government interest in the entity before the court could have substantial foreign policy implications.
>
> Against this background, the question before the Court comes into sharper focus. Where, as here, a foreign government owns 80% of the beneficial interest in an entity, particularly its national air carrier, there can be little doubt that the interest of the foreign sovereign are [sic] implicated to an extent sufficient to bring the case within the intended ambit of the statutory language.

Mousopole, 172 F.Supp.2d at 447. The court in *Parex Bank* reached a similar conclusion. *See Parex Bank,* 81 F.Supp.2d at 507-08 (the "plainer" reading of the statutory language coupled with its goals and purposes as reflected in its legislative history support a construction that recognizes successive tiering was contemplated by Congress).

The court need not devise a rule that addresses every scenario that could be conjured up under plaintiffs' "infinite looping" argument. It is sufficient to say that the Republic of Ireland's beneficial ownership of Icarom, an entity specifically brought under the government's dominion and control to avert a financial crisis in Ireland's insurance and banking industries, and in turn its national economy, falls squarely within the only construction of 1603(a) not at odds with the statutory purposes and public policy Congress sought to advance in passing the FSIA. *Compare Mousopole*, 172 F.Supp, At 447 ("Suffice it to say now that where, as here, the Republic of South Africa owns an eighty percent beneficial interest in SAA, the fact that it does so indirectly, through its wholly owned subsidiary Transnet, rather than directly, is immaterial to the analysis.").

Finally, the historical facts pertaining to the ownership of Icarom have not changed in any material fashion since the Third Circuit recognized ICI's right to invoke FSIA jurisdiction in *Texas Eastern*. As this court observed in its March 29, 1996, opinion, the district court in *Texas Eastern*

> determined that the Republic of Ireland's administration of ICI converted it to a foreign state in light of the following: (1) that ICI is a corporation organized and existing under the laws of the

Republic of Ireland; (2) that in March 1985, the government of Ireland acquired 100% of the shares of ICI through a wholly-owned corporation which has thereafter been operated by an administrator appointed by the government of Ireland; (3) that although the government of Ireland's administration of ICAROM is similar to a Chapter 11 proceeding under the United States Bankruptcy Laws, the administrator is vested with the powers of management and shareholder; (4) that in return for the ministry of industry and commerce of Ireland's guarantee of certain debts of ICI, all shares of ICI were transferred to Sealachais Archais Teoranta ("SAT"); (5) that the sole shareholders and directors of SAT are two officials of Ireland's Department of Industry and Commerce; (6) that the minister is authorized to hold and sell all shares of SAT, to exercise all of the rights and powers of the shareholders and to receive all dividends; and (7) that any dividends received or profits made go to the Exchequer of Ireland. Based on this, the district court concluded:

> Thus it seems clear that although ICI may be under the administration of the Courts for some purposes, a majority of the shares of ICI, "or other ownership interests" is owned by the Republic of Ireland. The statute provides that it be a majority of the shares or other ownership interest. Since SAT owns 100 percent of ICI's shares and SAT is 100 percent owned and controlled by the Republic of Ireland through its Minister of Industry and Commerce, and the sole shareholders and directors of SAT are officials of the Department of Industry and Commerce, there is a direct and complete ownership of ICI

> by the Republic of Ireland for purposes of 28 USC Section 1603.

Opinion of March 29, 1996 (Document 97) at pp. 23-25. In upholding jurisdiction, the court of appeals in *Texas Eastern* concluded that the factual findings leading to the district court's determination that ICI qualified as a foreign state were not clearly erroneous. *Texas Eastern*, 15 F.3d at 1238 n.8. This court observed that the record before it likewise reflected the Republic of Ireland's equitable ownership of Icarom through SAT which previously was held to be sufficient to invoke subject matter jurisdiction under the FSIA by both the district court and the court of appeals in *Texas Eastern*.

The conclusion that the *Texas Eastern* courts' [sic] recognition of subject matter jurisdiction was predicated on the same material facts that underlie Icarom's present invocation of FSIA jurisdiction is now inescapable. The record unequivocally demonstrates that the Republic of Ireland's beneficial ownership of Icarom throughout the duration of this litigation is virtually the same as the Republic of Ireland's beneficial ownership of ICI in the late 1980's when the *Texas Eastern* litigation was commenced. Gone from the strings in plaintiffs' bow is any serious contention that AIB somehow retains any ownership interest in Icarom. Nor can plaintiffs now contend that the 1990 sale of the ICI trade name and the Irish Business somehow effectuated a material change in the ongoing administration of Icarom. Plaintiffs' position has been reduced to arguments of statutory construction based on a zealously restricted reading of §1603 and the specter of "infinite looping" scenarios which are not presented by the form of beneficial ownership at issue. While plaintiffs argue that the circuit court's remand order demonstrates

that *Texas Eastern* does not bind or inform this court's determination of Icarom's status under the FSIA, it is unequivocally clear that the *Texas Eastern* courts considered the Republic of Ireland's tiered beneficial ownership of ICI/Icarom through SAT and were satisfied that the beneficial ownership established federal jurisdiction under the FSIA. Although plaintiffs correctly note that the doctrine of *stare decisis* does not apply where a different factual record has been presented, this court is satisfied that plaintiffs' discovery has failed to produce any new material fact of consequence. It follows that the same material facts under the same statutory scheme must lead to the same legal conclusions.

The Republic of Ireland has dominion and control over the ownership rights of Icarom. It has control over the legal disposition of Icarom's ownership through the Insurance Act of 1985 and it enjoys complete beneficial ownership of Icarom through a "tiered" arrangement that is common to the operational ownership of corporations and enterprises by foreign nations. The language employed in the FSIA and its legislative history support the view that beneficial ownership through tiered entities bestows foreign state status under the FSIA where a foreign nation retains a majority of that ownership interest. A contrary construction of the definition of a "foreign state" under the FSIA would undermine and frustrate the public policies Congress intended to effectuate through the passage of the FSIA. The court in *Texas Eastern* so recognized and this court continues to do so.

The record also supports defendants' alternative contention that Icarom enjoys foreign state status under the "organ" prong of §1603(b)(2). Plaintiffs' contentions to the contrary are misplaced.

Plaintiffs argue in their reply brief that Icarom has waived the right to invoke organ-based FSIA jurisdiction because it did not specifically advance that basis in the argument portion of the notice of removal. This basis thus assertedly adds an entirely new ground for jurisdiction which cannot be invoked at this juncture. Cited in support of this proposition are a series of cases that hold a new category of jurisdiction cannot be invoked to cure what ultimately has proven to be defective jurisdictional allegations.

The operative portion of the notice of removal provides:

> Removal of this action is expressly authorized by 28 U.S.C. § 1441(d), which provides, in pertinent part: "Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending."
>
> ICAROM is a "foreign state" within the meaning of 28 U.S.C. § 1603(a). That section defines a "foreign state" as, *inter alia*, "an agency or instrumentality of a foreign state as defined in subsection (b)." Subsection (b) of §1603, in turn, defines "an agency or instrumentality of a foreign state" as "any entity" that (1) "is a separate legal person, corporate or otherwise," (2) "is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," and (3) "is neither a citizen of a State of the United States . . . nor created under the laws of any third country." *Id.* §1603(b).

The notice thus invoked §1603 in its entirety as a basis for FSIA jurisdiction. No new category of jurisdiction is added by Icarom's alternate argument that it is an "organ" of a foreign state. And under these circumstances the cases cited by plaintiffs that prohibit amendment under 28 U.S.C. §1653 where at a new category of federal jurisdiction is asserted long after removal are inapposite.

Moreover, Icarom's argument that it meets the "organ" prong of §1603(b)(2) is premised on the same facts that support its invocation of the instrumentality prong of §1603(b)(2): the Republic of Ireland's historical acquisition and subsequent administration of ICI and Icarom. Thus, no new allegation need be explored to sustain this basis for foreign state status under the FSIA and any technical defect created by defendants' initial arguments in the notice of removal is deemed to have been cured. *See Camacho v. Cove Trader, Inc.*, 612 F.Supp. 1190, 1192 (E.D.Pa. 1985) (technical defects and faulty allegations may be cured under 28 U.S.C. §1653 at any time where it is in the interest of justice and the correction is not being used to supply missing allegations); *Norton v. Larney*, 266 U.S. 511 (1924) (holding under predecessor to §1653 that court may assume jurisdiction notwithstanding insufficient allegations where it appears elsewhere in the record that the grounds for federal jurisdiction are present and it would be "mere ceremony" to require an amendment to the pleading invoking that jurisdiction). Under these circumstances the court will treat defendants' notice of removal as amended to conform to the facts and arguments of record. *Compare Norton*, 266 U.S. at 517 ("We shall,

therefore, consider the bill as amended to conform to the facts of record and sustain the jurisdiction of the district court.") (citations in support omitted).[5]

The statute does not define an "organ" of a foreign state or a political subdivision thereof. The courts considering the issue have agreed that there is no talismanic formula or "clear test" for determining agency or instrumentality status under this prong of §1603(b)(2). *See, e.g., Kelly v. Syria Shell Petroleum Development B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000); *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1084 (9th Cir. 1999); *Supra Med. Corp. v. McGonigle*, 955 F.Supp. 374, 378-79 (E.D.Pa. 1997). Factors commonly considered include:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the foreign country; and (5) how the entity is treated under foreign state law.

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[5] Plaintiffs' contention in their opposition to certain domestic defendants' joint motion for leave to file a sur-reply brief (Document 540) that Icarom itself has not joined in the presentation of the "organ of a foreign state" argument is belied by the record. All defendants raise the argument in support of jurisdiction. The London defendants raise it in their memorandum in opposition (Document 529) at pages 34-39. They contend that under any construction of the record Icarom is "a quintessential organ of the Irish state." *Id.* at p. 2. The certain domestic defendants' argue in their joint opposition (Document 530) that the history and purpose underlying Ireland's acquisition of Icarom and the close supervision and pervasive control it has exercised over all aspects of Icarom's ongoing affairs meets the "organ" prong of §1603(b)(2). *See* Certain Domestic Defendants' Joint Opposition at pp. 23-27.

Kelly, 213 F.3d at 846-47 *(quoting Supra Med. Corp.*, 955 F.Supp. at 379.); *see also Patrickson*, 251 F.3d at 807 ("in defining whether an entity is an organ, courts consider whether the entity engages in a public activity on behalf of the foreign government [and] [i]n making this determination, courts examine the circumstances surrounding the entity's creation, the purposes of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law") Courts likewise have recognized that "[t]he entity may be an organ even if it has some autonomy from the foreign government" and that all of the referenced factors need not be present. *Patrickson*, 251 F.3d at 807 *(citing in support Cortoracion Mexican de Servicios Maritimos, S.A. de C.V. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996)); *see also Kelly*, 213 F.3d at 847 (although the identified "factors provide a helpful framework, we will not apply them mechanically or require that all five support an organ-determination").

Application of the common factors as a whole demonstrates that Icarom is an organ of the Republic of Ireland within the meaning of §1603(b)(2). The Irish government's acquisition of and control over ICI (and ultimately Icarom) was designed to and has served the important national purpose of protecting the Irish insurance and banking industries from financial disaster, which in turn has helped to maintain stability in the Irish economy. The acquisition was not undertaken to provide the Irish government with a profit-making opportunity. Instead, ICI was acquired solely for public purpose. And the acquisition and administration of ICI/Icarom has exposed the Irish government to significant financial risk. Notwithstanding this risk the Irish government has not sought to turn

ICI/Icarom into a revived commercial entity generating profit and instead has taken control of the carrier through administrative proceedings designed to stabilize a failing major industry and wind-up the affairs of an insolvent entity within that industry.

The Irish government also has arranged and provided financial support for the funding needed to runoff Icarom's long-term liabilities. These arrangements and commitments have subjected the Irish government to substantial risk and consumed a significant amount of its civil servants' time and effort. And while the government does not control the day-to-day operations of Icarom, it has established substantial control and supervision over all significant aspects of the process designed to wind-up Icarom's existence. This has included oversight and approval of personnel hired and appointed to accomplish the discharge of Icarom's long-term liabilities.

The factors underlying the Republic of Ireland's acquisition and administration of Icarom are substantially similar to those that led the Court of Appeals for the Ninth Circuit to recognize Japan's control over a public television corporation bestowed foreign state status on that corporation under the FSIA. In *Alpha, Therapeutic Corp.,* the court applied the common factors noted above to the circumstances pertaining to a public television broadcasting corporation known as Nippon Hoso Kyokai ("NHK"). *See generally Alpha Therapeutic Corp.,* 199 F.3d at 1084-85. NHK was created by Japanese broadcast law, which mandated that it broadcast for the public welfare. Japanese regulations set programming goals which NHK was required to meet. Members of NHK's board were appointed by the Japanese Prime Minister with the consent of the Japanese Parliament. The supervisor of the board was a

government minister. NHK's budget was reviewed and monitored by the board supervisor and approved by the Japanese Parliament. Funding for the station was obtained through a fee levied against television owners. Any change in the articles of incorporation governing NHK's operations had to be approved by a government minister and the station was prohibited from earning profits or carrying commercial advertisements. *Id.*

Although not identical, the facts leading to the recognition of NHK as an organ of Japan reflect substantially similar government interests and oversight. Both ICI and NHK were placed under a form government ownership for the purpose of serving an important national interest. The initiation of goals designed to further that interest were established by legislation and bureaucratic action. The government monitored and exercised control over the key aspects of the entity's operations through the use of civil servants and cabinet ministers. The entity's key personnel were approved by the foreign government. Funding was arranged by and provided through the authority of the foreign government. And the entity was not operated to generate a profit. These similarities support the recognition of Icarom as an organ of the Irish government. *Accord EOTT,* 257 F.3d at 997 (opining that the important national interest to be served by Ireland's acquisition of ICI/Icarom, the ownership of ICI/Icarom through SAT, the use of the government's political and economic resources in sustaining the ongoing operations of ICI/Icarom, the accountability of ICI/Icarom's administrator to the minister, the nature of Icarom's ongoing business and the lack of profit-based motive weighed in favor of a finding of organ status on remand).

ICI/Icarom was acquired and has been administered solely for an important national purpose. Throughout the history of this litigation Icarom has been engaged in an activity designed to further that public interest. The Irish government has established a substantial level of oversight and control over all major decisionmaking affecting Icarom's ongoing financial affairs. The Irish government has exposed itself to substantial financial risk to assure that Icarom will be able to accomplish the national purpose to be served by its acquisition and administration. The Irish government has exercised significant oversight in the appointment of key personnel. Accordingly, the record supports Icarom's invocation of foreign state status under the organ prong of §1603 (b)(2).

Finally, plaintiffs' waiver argument concerning the "service of suit" clause is unavailing. First, the argument is not within the limited scope of jurisdiction vested in this court under the circuit court's order of remand. Second, the *Texas Eastern* court's standard for waiver and application of that standard to an identical service of suit clause continues to provide binding precedent resolving the matter as relates to the instant record. This court so recognized in its March 29, 1996 opinion and it remains obligated to do so.

For the reasons set forth above, plaintiffs' renewed motion to remand must be denied.

An appropriate order will follow.

/s/ Gustave Diamond
Gustave Diamond
United States District Judge

Date: September 11, 2002